EXHIBIT IN EVIDENCE

No. 238 ~~4887~~

1919 ~~1922~~ STATE AND COUNTY TAX RECEIPT

ORIGINAL

Due by Farmers Bank & Trust Co. Address ...... County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots 1 Street	25617	
Tangible property other than live stock and poultry		
Intangible property	131336	
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	156953	627 81
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions	156953	
Total amount State tax		627 81

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property	131336		
5 Agricultural products subject to county rate of 15c			
Total	131336		
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate	131336	131336	
Amount subject to county tax @ 50 per $100		25617	128 09

School tax @ ...... per $100	
School tax District No.	
Poll tax	
Other levies 20	51 23
Total state and county taxes	807 13
6% penalty Dec. 1, 1922	
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	
Advertising real estate	
Total tax and penalties	

Attest: J. H. H. Clerk.

Received payment in full
Nov. 29, 1919 ~~1920~~
F. V. Nunnelly Sheriff.
By O. M. McFarland D. S.

1919
~~1922~~ STATE AND COUNTY TAX RECEIPT

No. 283 ~~4888~~

ORIGINAL

Due by ~~[illegible]~~ First Nat'l Bank Address .... County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots .... Street		
Tangible property other than live stock and poultry		
Intangible property	138550	
Total	138550	
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	138550	554 20
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions	138550	
Total amount State tax		554 20

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1	Agricultural implements			
2	Manufacturing machinery			
3	Raw material at plant			
4	Intangible property	138550		
5	Agricultural products subject to county rate of 15c			
	Total	138550		
	Less exemptions taken from items 1, 2 and 3			
	Total property not subject to full county rate	138550	138550	
	Amount subject to county tax @ .... per $100			

Attest: JWH.
Clerk.

Received payment in full
Nov. 29 1919 ~~1922~~

F. V. Nunnelly
Sheriff.

By A. P. Briscoe
D. S.

School tax @ .... per $100	
School tax District No.	
Poll tax	
Other levies	
Total state and county taxes	554 20
6% penalty Dec. 1, 1922	
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	
Advertising real estate	
Total tax and penalties	

207

~~№ 4889~~ 199

1922 STATE AND COUNTY TAX RECEIPT

ORIGINAL

ue by Farmers Bank & Trust Co. Address .... County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots 1 Street	19180	
Tangible property other than live stock and poultry		
Intangible property	145260	
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	164440	657 76
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions	164440	
Total amount State tax		657 76

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property	145260		
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate		145260	
Amount subject to county tax @ .... per $100		19180	95 90

School tax @ .... per $100	
School tax District No.	
Poll tax	
Other levies Road Tax 20¢ per $100.08	38 36
Total state and county taxes	792 02
6% penalty Dec. 1, 1922	
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	
Advertising real estate	
Total tax and penalties	

Attest:
JWH. Clerk.

Received payment in full
Nov 29, 1922
F. V. Nunnelly Sheriff.
By A. P. Briscoe D. S.

1920 ~~1922~~ STATE AND COUNTY TAX RECEIPT

№ 4890

ORIGINAL

Due by ~~Georgetown~~ First Nat'l Bank Address .... County. State, County and Other Taxes 1922

Description Real Estate and Improvements		Valuation	Amount of Tax
No. of acres			
Mineral rights and leases			
Town lots .... Street			
Tangible property other than live stock and poultry			
Intangible property		134509	
Total			
Less exemptions taken from tangible property other than live stock and poultry			
Amount subject to State tax @ 40c per $100		134509	538 03
Total live stock and poultry .... $			
Exemption from live stock and poultry .... $			
Live stock and poultry subject to tax .... $ .... at 10c per $100			
Total valuation of property listed less exemptions			
Total amount State tax			538 03
Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation. Item No. 5 Subject to County Rate of 15c per $100.			
1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property	134509		
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate			
Amount subject to county tax @ .... per $100			
School tax @ .... per $100			
School tax District No.			
Poll tax			
Other levies Road Tax 20¢ per $100.00			
Total state and county taxes			538 03
6% penalty Dec. 1, 1922			
6% interest Dec. 1, 1922			
6% sheriff's commission; where levy or distraint is made			
Advertising real estate			
Total tax and penalties			

Attest: JWH.
Clerk.

Received payment in full
Nov. 29, 1920 ~~1922~~

F.V. Nunnelly
Sheriff.

By O M McFarland
D. S.

1921

~~1922~~ STATE AND COUNTY TAX RECEIPT

№ 269 ~~4891~~

ORIGINAL

Due by First Georgetown Natl Bank Address .... County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots 1 Street Omitted	8000	
Tangible property other than live stock and poultry		
Intangible property	147575	
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	155575	62220
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions		
Total amount State tax		62220

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property	147575		
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate		147575	
Amount subject to county tax @ 45 per $100		8000	3600

Attest:
J. H. W.
Clerk.

Received payment in full
Nov 29, 1921
F. V. Nunnelly
Sheriff.

By ....
D. S.

School tax @ .... per $100	
School tax District No.	
Poll tax	
Other levies 20% Road Tax	1600
Total state and county taxes	67430
6% penalty Dec. 1, 1922	
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	
Advertising real estate	
Total tax and penalties	

1921 Nº 219

~~1922~~ STATE AND COUNTY TAX RECEIPT

4892

ORIGINAL

Due by Farmers Bank & Trust Co. Address .... County. State, County and Other Taxes 1922.

Description Real Estate and Improvements		Valuation	Amount of Tax
No. of acres			
Mineral rights and leases			
Town lots 1 Street		18500	
Tangible property other than live stock and poultry			
Intangible property R 401		155012	
Total		173512	
Less exemptions taken from tangible property other than live stock and poultry			
Amount subject to State tax @ 40c per $100		173512	694 05
Total live stock and poultry $			
Exemption from live stock and poultry $			
Live stock and poultry subject to tax $ at 10c per $100			
Total valuation of property listed less exemptions		173512	
Total amount State tax			694 05
Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation. Item No. 5 Subject to County Rate of 15c per $100.			
1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property	155012		
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate		155012	
Amount subject to county tax @ .... per $100		18500	83 25
School tax @ .... per $100			
School tax District No.			
Poll tax [illegible]			
Other levies Road Tax 20 ¢ on $100			37 00
Total state and county taxes			814 30
6% penalty Dec. 1, 1922			
6% interest Dec. 1, 1922			
6% sheriff's commission; where levy or distraint is made			
Advertising real estate			
Total tax and penalties			

Attest:

JWH.
Clerk.

Received payment in full

Nov. 29, ~~1922~~ 1921

F. J. Nunnelly
Sheriff.

By ....
D. S.

№ ~~4894~~

1919
~~1922~~
Georgetown Natl Bank

State and Other Taxes

State tax	$
County tax	$ 692.75 –
County school	$
County poll	$
Road ~~Other levies~~	$ 277.10
Total tax	$ 969.85 –
Penalties	$
Interest	$
Sheriff's cost	$
Other cost	$
Total	$
Exonerations	$
TOTAL	$

Sheriff.

By ______ D. S.

~~1922~~ STATE AND COUNTY TAX RECEIPT

№ ~~4894~~

ORIGINAL

Due by Georgetown National Bank Address ______ County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots ______ Street		
Tangible property other than live stock and poultry Bank Shares	138550	
Intangible property		
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	138550	554.20
Total live stock and poultry ______ $		
Exemption from live stock and poultry ______ $		
Live stock and poultry subject to tax ______ $ ______ at 10c per $100		
Total valuation of property listed less exemptions		
Total amount State tax		554.20

Correct Receipt

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1	Agricultural implements		
2	Manufacturing machinery		
3	Raw material at plant		
4	Intangible property		
5	Agricultural products subject to county rate of 15c		
	Total		
	Less exemptions taken from items 1, 2 and 3		
	Total property not subject to full county rate		
	Amount subject to county tax @ 50 per $100	138550	692.75

School tax @ ______ per $100	
School tax District No.	
Poll tax	
Other levies 20¢ Road Tax	277.10
Total state and county taxes	1524.05 –
6% penalty Dec. 1, 1922	554.20
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	969.85 –
Advertising real estate	
Total tax and penalties	

Paid Nov 29

Attest:
L. L. Calvert
Clerk.

Received payment in full

______, 1922

______ Sheriff.

By ______ D. S.

212

№ 257 ~~4895~~

1930
~~1922~~

State and Other Taxes

State tax	$
County tax	$
County school	$
County poll	$
Other levies	$
Total tax	$
Penalties	$
Interest	$
Sheriff's cost	$
Other cost	$
Total	$
Exonerations	$
TOTAL	$

Sheriff.

By ______ D. S.

1930 ~~1922~~ STATE AND COUNTY TAX RECEIPT

№ 257 ~~4896~~

ORIGINAL

Due by Georgetown National Bank Address County. State, County and Other Taxes 1922.

Corrected Receipt

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots ______ Street		
Tangible property other than live stock and poultry Bank, Share	137509	
Intangible property		
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	134509	538 03
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 15c per $100		
Total valuation of property listed less exemptions		
Total amount State tax		538 03

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property			
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate			
Amount subject to county tax @ 50 per $100		134509	672 54

Attest:
L. L. Colvert
Clerk.

Received payment in full

______ 1922

______ Sheriff.

By ______ D. S.

School tax @ ______ per $100	
School tax District No.	
Poll tax	
Other levies 20¢ Road Tax	269 02
Total ~~State~~ and county taxes	1479 59
6% penalty Dec. 1, 1922 Paid Mar 29, 1930	538 03
6% interest Dec. 1, 1922	
6% sheriff's commission; where levy or distraint is made	
Advertising real estate Bal. Due	941 56
Total tax and penalties	

213

Nº ~~4896~~ 269

1921
~~1922~~

State and Other Taxes

State tax	$
County tax	$
County school	$
County poll	$
Other levies	$
Total tax	$
Penalties	$
Interest	$
Sheriff's cost	$
Other cost	$
Total	$
Exonerations	$
TOTAL	$

Sheriff.

By D. S.

Nº ~~4896~~ 269

1921 ~~1922~~ STATE AND COUNTY TAX RECEIPT

ORIGINAL

Due by Georgetown National Bank Georgetown Ky. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots 1 Street	8000	
Tangible property other than live stock and poultry Bank Shares	147575	
Intangible property		
Total		
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	155575	622.30
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions		
Total amount State tax		622.30

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1 Agricultural implements			
2 Manufacturing machinery			
3 Raw material at plant			
4 Intangible property			
5 Agricultural products subject to county rate of 15c			
Total			
Less exemptions taken from items 1, 2 and 3			
Total property not subject to full county rate			
Amount subject to county tax @ 45 per $100		155575	700.09

Attest:
L. L. Colvert
Clerk.

Received payment in full

1922

Sheriff.

By D. S.

School tax @ per $100	
School tax District No.	
Poll tax	
Other levies 20¢ Road Tax	311.15
Total state and county taxes	1633.54
6% penalty Dec. 1, 1922 Pd Nov 28, 1921	674.30
6% interest Dec. 1, 1922 Bal. Due	959.24
6% sheriff's commission; where levy or distraint is made	
Advertising real estate	
Total tax and penalties	

214

№ ~~4897~~
269

1922

Georgetown
Natl Bank

State and Other Taxes

State tax	$ 619.08
County tax	$ 696.47
County school	$
County poll	$
Other levies	$ 309.54
Total tax	$ 1625.09
Penalties	$
Interest	$
Sheriff's cost	$
Other cost	$
Total	$
Exonerations	$
TOTAL	$

Sheriff.

By .... D. S.

№ 4897

1922 STATE AND COUNTY TAX RECEIPT

ORIGINAL

Due by Georgetown Natl Bank County. State, County and Other Taxes 1922.

Description Real Estate and Improvements	Valuation	Amount of Tax
No. of acres		
Mineral rights and leases		
Town lots 1 Street	10000	
Tangible property other than live stock and poultry Bank Shares	144771	
Intangible property		
Total	154771	
Less exemptions taken from tangible property other than live stock and poultry		
Amount subject to State tax @ 40c per $100	154771	61908
Total live stock and poultry $		
Exemption from live stock and poultry $		
Live stock and poultry subject to tax $ at 10c per $100		
Total valuation of property listed less exemptions		
Total amount State tax		61908

Items Nos. 1, 2, 3 and 4 Not Subject to County Taxation.
Item No. 5 Subject to County Rate of 15c per $100.

1	Agricultural implements	
2	Manufacturing machinery	
3	Raw material at plant	
4	Intangible property	
5	Agricultural products subject to county rate of 15c	
	Total	
	Less exemptions taken from items 1, 2 and 3	
	Total property not subject to full county rate	

	Valuation	Amount of Tax
Amount subject to county tax @ .... per $100	154771	69647
School tax @ .... per $100		
School tax District No.		
Poll tax		
Other levies 20 ¢ Road Tax		30954
Total state and county taxes		162509
6% penalty Dec. 1, 1922		
6% interest Dec. 1, 1922		
6% sheriff's commission; where levy or distraint is made		
Advertising real estate		
Total tax and penalties		

Attest: L. L. Calvert Clerk.

Received payment in full

.... 1922

.... Sheriff.

By .... D. S.

EXHIBIT IN EVIDENCE

The exhibit referred to on page 60, order No. 13, and also filed as a part of — J. C. Nichols, Cashier of the Farmers Bank and Trust Company, Georgetown, Kentucky, is as follows:

The Farmers Bank & Trust Company, Georgetown, Kentucky

Officers

R. B. Thomas	President.
Buford Hall	Vice-President.
John S. Gains	" "
R. Q. Ward	" "
J. C. Nichols	Cashier.

Statement June 30th, 1921

Resources

[fol. 203] Loans and Discounts	$726,708.03
U. S. Bonds and Securities	200,558.41
	$927,266.44
Bank Building	21,000.00
Furniture and Fixtures	39,870.13
Cash in Hand	17,644.91
Due from Banks	67,751.59
Overdrafts	588.94
	$1,074,122.01

Liabilities

Capital Stock	$105,000.00
Surplus	70,000.00
Undivided Profits	18,518.08
Reserve for taxes	4,270.89
Unearned Discount	12,700.00
Bills Payable	35,000.00
Deposits	828,633.04
	$1,074,122.01

Semi-annual devidend No. 30, six per cent., to credit of stockholders.

State examination. Member Federal Reserve System. Government supervision.

Directors

J. C. Bradley.
Noah Mulholland.
John S. Gaines.
C. H. Garth.
P. H. Nunnelley.
H. M. Haggard.
G. M. Taylor.
Buford Hall.
R. B. Thomas.
J. B. Ward.
J. A. Hamon.
R. Q. Ward.

(Here follow Exhibits in Evidence, marked side folio pages 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, and 215) [fol. 216 & 217] IN CIRCUIT COURT OF SCOTT COUNTY

CLERK'S CERTIFICATE

I, B. B. Hall, Clerk of the Scott Circuit Court do hereby certify
2*
that the foregoing 114 pages contain a true, correct and complete copy of all the pleadings, depositions and Exhibits filed in the case of the Georgetown National Bank against Ollie McFarland, Sheriff of Scott County, Kentucky, Etc.

Said case was lately pending in the Scott Circuit Court.

Given under my hand as Clerk of the Court aforesaid this 19th day of December 1923.

B. B. Hall, Clerk Scott Circuit.

Clerk's charge for transcript $97.30.

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*In pencil in copy.

[fol. 218] IN COURT OF APPEALS OF KENTUCKY

OLLIE MCFARLAND, Sheriff of Scott County, Kentucky; THE FISCAL COURT OF SCOTT COUNTY, KENTUCKY, Composed of J. B. Ward, County Judge; Clayton Thomasson, County Commissioner; T. K. Shuff, County Commissioner, and L. F. Aulick, County Commissioner, Appellants,

vs.

THE GEORGETOWN NATIONAL BANK, Appellee

STATEMENT BY APPELLANTS—Filed Dec. 20, 1924

The names of the parties to this appeal are as stated in the caption of the Scott Circuit Court (on the 19th day of October, 1923) and may be found on pages 61, 62, 63 and 64 of the record.

The appeal was granted below and no summons or warning order is desired.

The names and addresses of appellee's attorneys are as follows:

Bradley & Bradley, Georgetown, Ky.
James Bradley, Georgetown, Ky.

H. C. Ford & Jas. B. Finnell, Counsel for Appellants, Georgetown, Ky.

[fol. 219] IN COURT OF APPEALS OF KENTUCKY

SUBMISSION OF CAUSE—April 16, 1924

It is ordered that this case be submitted.

[fol. 220] IN COURT OF APPEALS OF KENTUCKY

SUBMISSION OF MOTION TO ADVANCE—May 6, 1924

Came appellee, by Counsel, and filed motion to advance and for an oral argument: Which motion is submitted.

[fol. 221] IN COURT OF APPEALS OF KENTUCKY

ORDER SUSTAINING MOTION TO ADVANCE AND OVERRULING APPELLEE'S MOTION FOR ORAL ARGUMENT—May 9, 1924

The Court being sufficient- advised, it is considered that appellee's motion to advance be, and is sustained: It is further considered that appellee's motion for an oral argument be and the same is overruled.

[fols. 222 & 223] IN COURT OF APPEALS OF KENTUCKY

JUDGMENT—Feb. 24, 1925

The Court being sufficient- advised, it seems to them the judgment herein is erroneous.

It is therefore considered that the said judgment be reversed and cause remanded for a judgment as indicated in the opinion herein, which is ordered to be certified to the said Court.

It is further considered that the appellant recover of the appellee their costs herein expended.

[fol. 224] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—Feb. 24, 1925

In 1915 the following amendment was made to Section 171 of the constitution:

"The General Assembly shall have power to divide property in two classes and to determine what class or classes of property shall be subject to local taxation."

Under this provision it was enacted in 1917 as follows:

"Money in hand, notes, bonds and other credits, whether secured by mortgage, pledge or otherwise, or unsecured * * * shall be subject to taxation for state purposes only." Section 4019a Subsection 10 Kentucky Statutes.

[fol. 225] By the same act it was provided that the shares of stock of national banks, state banks and trust companies are put in a class by themselves and are subject to a state tax on each $100.00, with this further provision:

> "In addition thereto the said banks and trust companies shall pay to the local authorities in said counties, cities, towns and districts, taxes at the same rate imposed upon other personalty therein."

The result of the act is that the shares of stock in national banks, state banks and trust companies are subject to a state tax of 40¢ on each $100.00, while money in hand, notes, bonds, and other credits held by others are subject to taxation for state purposes only. Section 5219 of the U. S. Revised Statutes grants to the states the right to tax shares in the national banks, subject to this restriction:

> "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

The Georgetown National Bank brought this action to enjoin the sheriff from collecting the county taxes from the bank for the years 1919, 1920, 1921 and 1922 on the ground that the statute was in conflict with the Federal Statute and void. The circuit court adjudged the bank the relief sought. The defendants appeal.

In Hepburn v. School District, 23 Wallace 480, it was held that municipal and school taxes may be assessed upon the shares of a [fol. 226] national bank, although mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation except for state purposes. In holding this the court said:

> "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Again in Mercantile National Bank v. New York, 121 U. S. 138, it was held that the exemption from state taxation of Saving Banks deposits did not invalidate a statute taxing national banks. The court said:

> "The main purpose, therefore, of Congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy."

This rule was adhered to in National Bank v. City of Boston, 125 U. S. 83, although it was shown there "that Saving Banks were permitted to transact a banking business in the way of loans upon personal securities, upon the ground that saving banks are substantially institutions organized for the purpose of investing the savings of small depositors and not a banking institution in the commercial sense of the word. These opinions were followed in Jenkins v. Neff, [fol. 227] 186 U. S. 230, under a statute exempting from taxation against trust companies United States securities held by them. In Merchants' National Bank v. City of Richmond, 256 U. S. 635, the court had before it the statute of Virginia, under which tax for state purposes was imposed upon bank stock, state and national, at the rate of 35¢ and a tax for city purposes at the rate of $1.40; while upon intangible personal property in general, including bonds, notes and other evidences of indebtedness the state rate was 65¢ and the city rate 40¢, or an aggregate of 95¢ upon each $100.00 of valuation as against a total of $1.75 on bank stocks. In that case the court said this:

"It also was shown by evidence, without dispute, that moneyed capital in the hands of individuals invested in bonds, notes and other evidences of indebtedness comes into competition with the national banks in the loan market."

Basing its judgment on this undisputed fact the court held the Virginia act invalid. After the decision was rendered the Congress of the United States passed the following act amending Section 5219 of the revised statutes:

"Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided [fol. 228] the following conditions are complied with:

"1. (a) The imposition by said state of any one of the above three forms of taxation shall be in lieu of the others.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares or the net income as above provided of any national banking association owned by nonresidents of any State, or the dividends on such shares owned by such nonresidents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real prop-

[fol. 229] "3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. Approved March 4, 1923."

The Supreme Court of the United States has steadily held that the exemption of some capital is not invalid, unless the capital so exempted comes in competition with national banks. A statute of Kansas exempting from local assessment the capital stock of corporations invested in mining claims was held valid in Talbott v. County Commissioners, 139 U. S. 438. In First National Bank v. Chehalis 166 U. S. 440, the same conclusion was reached as to other capital on the ground that it did not appear that the exempted capital came in competition with national banks. The same conclusion was reached in First National Bank v. Ayers, 160 U. S. 640, and in First National Bank v. Chapman 173 U. S. 205; the ground of the decision in each of these cases being the want of a showing that the moneyed capital left unassessed or any material portion thereof, came into competition with the national banks.

[fol. 230] In this case it is not shown by evidence without dispute that the moneyed capital in the hands of individuals invested in bonds, notes and other evidences of indebtedness comes in competition with the national banks. While a number of witnesses so testify there is testimony to the contrary and the conclusion of the witnesses testifying to the existence of competition is not borne out by the facts shown by all the testimony. It is shown by all the testimony that the banks make short time loans and that they decline to make loans on long time. It is also shown that the banks are lending to the limit and are re-discounting their paper in order to accommodate customers for a large part of the year. The moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running for a longer time than banks are willing to lend money for. It is not shown by anybody that any appreciable amount of money held by individuals is used in short time loans, such as the banks make, and this being true the capital invested in land notes and the like does not come in competition with the national banks, for they do not handle this character of paper. The facts shown by the record warrant the conclusion that no material part of the capital held by the individuals is so invested as to come in competition with the national banks and on the record we so hold.

The plain purpose of the Act of Congress, approved March 4, 1923, was to remove the uncertainty following the decision of the U. S. Supreme Court in the Virginia case above referred to. To that end it was expressly provided in the Act that: "bonds, notes and other evidences of indebtedness in the hands of individual citi- [fol. 231] zens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." Under that Act the Kentucky Statute is valid. The 4th section of the Act was added to prevent further confusion in the collection of such taxes, whether levied before or after the passage of the Act. Among other things it expressly provides: "The provisions of Sec. 5219 of the Revised Statutes of the U. S. as heretofore in force, shall not prevent the legalizing, ratifying or confirming by the States of any tax heretofore paid, levied or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section." The words "said section" must mean the section as amended by this Act; for else the words "would be valid", are meaningless; the provision plainly refers to taxes which would be valid under the Act but might not be valid under the original Act. The states needed no authority to collect taxes properly levied under the old Act. The section was intended to give the power to collect taxes levied under the old Act, if such levy was valid under the amended Act. This is conclusively shown by the words "legalizing, ratifying or confirming," for there was no need to legalize, ratify or confirm previous levies if they were valid under the old statute. The State of Kentucky has ratified and confirmed the taxes heretofore levied and assessed by collecting them. This as we know from the current history of the state has been done for the years in question. Its proceeding by the sheriff to collect the taxes in question was an [fol. 232] act ratifying and confirming the taxes theretofore levied and assessed and by the express words of the amendment, Section 5219, "shall not prevent * * * the collecting thereof to the extent that such tax would be valid under said section."

We therefore conclude that the state statute is valid and that the state has authority to collect the taxes under it. There is no limitation upon the power of Congress to pass an Act of this character authorizing the state to collect taxes previously levied.

In making out the tax bills for the years 1919, 1920 and 1921 the clerk, by mistake, failed to include in them the county taxes. In 1922, when this was called to his attention, he issued corrected tax bills including the county taxes, such as he should have issued originally. It is insisted that these correct tax bills are void. By section 4239a Kentucky Statutes it is provided that the county clerk "shall annually make out for the use of the sheriff or collector, a book of tax bills and stubbs." In making out this book he acts purely as a ministerial officer. He has no discretion to exercise. If he fails to perform his duty, under the statute he is liable on his bond and he may be required by a mandamus to make out the proper tax bills. H has not performed his duty until he makes out the tax bills correctly. In numerous cases this court has awarded a mandamus against a ministerial officer who had failed to discharge a duty imposed upon him by statute. But in such cases the officer is not required to wait until he is required by a mandamus to act. In this [fol. 233] case the county clerk simply did what he would be required to do by mandamus if he had not made out the corrected tax bills voluntarily. The tax bills are therefore valid, for the public revenues are not to be defeated by the failure of a public officer to discharge a mere ministerial duty at the time he should have discharged it.

As to the year 1922 a different question arises. The bank in its report assessed its capital stock at $119,000. The Board, without any notice to the taxpayer, raised this to $144,772. Section 4019a, Subsec. 10 provides for the assessment of bank stock and it provides that the equalization, collection, penalties and laws relating thereto for other personal property shall apply in like manner to the collection of the taxes therein provided. Section 4053 Kentucky Statutes provides as to other personal property as follows:

> "If the value fixed by the assessor be greater than that fixed by the taxpayer, it shall be the duty of the assessor to notify the taxpayer at the time of the assessment of the amount of such increase, and of the time and place of the meeting of the Board of Supervisors. The assessor shall report to the Board of Supervisors a list of all taxpayers in the county whose tax list have been added to or increased by him after receiving them from the hands of the taxpayer, together with a short statement."

There being no notice to the taxpayer of the raise in the assessment as reported by him, the raise was invalid. The circuit court did not err in so holding. It is the plain purpose of the statute, taken as a whole, to require notice to the taxpayer when the valuation fixed by him is raised by the assessing officer. The statute does [fols. 234 & 235] not require each taxpayer to watch the record and see what the assessing officer does after he returns his list. This would lead to endless confusion. Unless he has notice of a change in the valuation he has placed upon the property he has a right to assume that this valuation is unchanged. On the return of the case to the circuit court a judgment will be entered on the counterclaim for the amount of the taxes for 1922 upon the basis of the valuation fixed by the taxpayer with interest from Sept. 22, 1922. As to the other years a judgment will be entered dismissing the petition and giving judgment on the counterclaim for the taxes with interest from the time the amended tax bills were made.

Judgment reversed and cause remanded for a judgment as above indicated.

H. C. Ford, Georgetown Ky.; Jas. B. Finnell, Georgetown, Ky.; Ford & Ford, for appellant.

Bradley & Bradley, Georgetown, Ky.; James Bradley, Georgetown, Ky., for appellee.

[fol. 236] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 25, 1925

Now comes The Georgetown National Bank, plaintiff-in-error, and respectfully submits that in the record, proceedings, decisions, and final judgment of the Court of Appeals of the State of Kentucky, in the above matter, there is manifest — in this towit:

First. The Court erred in holding that the provisions of Chapter 108 of the Kentucky Statutes, and especially Section 4019a10 thereof, of the laws of the State of Kentucky, are not in conflict with and in violation of the provisions of and repugnant to United States Revised Statutes, Section 5219, for that the State of Kentucky, by and through the provisions of said chapter and said section, assumes and seeks, through the defendant-in-error, as Sheriff of Scott County, Kentucky, and the Collector of Revenue, for the purposes of said county:

[fol. 237] (a) To deprive the plaintiff-in-error, as a national banking association, of the immunities and protection provided by said Act of Congress, Revised Statutes, Section 5219, in that all taxable intangible personal property, including all moneyed capital in the hands of the individual citizens of such State excepting only the shares of stock in national banks, State banks and trust companies, in the State of Kentucky and in Scott County, Kentucky, is made taxable at the rate of 40¢ per one hundred dollars of valuation and taxable "for State purposes only," whereas shares of stock of plaintiff-in-error and all other national banking associations, State banks and trust companies doing business in the State of Kentucky, are "in addition thereto" made liable to county, city and school taxing rates levied in the several jurisdictions and in Scott County, Kentucky, aggregating a total of $2.70 per one hundred dollars of valuation.

(b) To deprive and to deny to the plaintiff-in-error, and all other national banking associations, State banks and trust companies doing business within the jurisdiction of the Commonwealth of Kenticky, the equal protection of the law and especially of the Fourteenth Amendment to the Constitution of the United States.

[fol. 238] Second. The Court erred in holding that by the provisions of Section 4019a-10 of the laws of Kentucky, the plaintiff-in-error is not deprived of its rights, privileges and immunities secured to it and other national banking associations organized under the Act of Congress, and especially of Revised Statutes, Section 5219 thereof.

Third. The Court erred in holding that the Act of Congress, approved March 4, 1923, as an amendment and reenactment of Revised Statutes, Section 5219, was retroactive, and that said amendment "was intended to give the power to collect taxes levied under the old Act if such levy was valid under the amendment"; and "under that Act" (the amendment of March 4, 1923,) "the Kentucky Statute is valid," and the taxes levied for said county purposes for each of the years 1919, 1920, 1921 and 1922, are collectible.

Fourth. The Court erred in its interpretation and construction of Revised Statutes, Section 5219, to the prejudice and damage and injury of plaintiff-in-error.

Fifth. The Court erred in its interpretation and construction of the Act of Congress of March 4, 1923, amending and reenacting Revised Statutes, Section 5219, to the prejudice and damage and injury of plaintiff-in-error.

[fol. 239] Sixth. The Court erred in holding:

(a) That it was necessary for the plaintiff-in-error to establish its case by conclusive and undisputed evidence and in holding against the plaintiff's contention, because "in this case it is not shown by evidence without dispute that the moneyed capital in the hands of individuals invested in bonds, notes or other evidences of indebtedness comes into competition with the national banks."

(b) That "it is shown by all the testimony that the banks make short-time loans and that they decline to make longtime loans."

(c) That because banks generally, and plaintiff-in-error, avail themselves of their national charter powers to borrow money or rediscount notes, competition of individual citizens in like securities is immaterial, upon the assumption that it is not a function of banks in making money to avail themselves of their right to borrow money or rediscount during part of the year for the purpose of making short-time loans.

(d) That because "the moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running for a longer time than banks are willing to lend money for," there is no competition with banks, notwithstanding the evidence established that banks did and do so invest in large amounts and are in direct competition with individual lenders to secure such loans and that national banks are expressly authorized to so invest by an Act of Congress known as Federal Reserve Act, Section 24.

(e) That "it is not shown by anybody that any appreciable amount of money held by individuals is used in short-time loans, such as the banks make, and this being true the investment in land [fol. 240] notes and the like does not come in competition with the national banks for they do not handle that character of paper";

whereas the fact is that such competition, in a material amount, was established by the evidence, and that all intangible personal property in Kentucky owned by individuals throughout the State is given the preferential and discriminatory 40¢ rate, and bank shares alone are subjected to higher rates aggregating $2.70 per hundred dollars of valuation, or higher.

(f) That "the facts shown by the record warrant the conclusion that no material part of the capital held by individuals is so invested as to come in competition with national banks, and on the record we so hold;" whereas the evidence established exactly the contrary and established that throughout the State of Kentucky, individual investors in all taxable intangible personal property have invested over $309,000,000, while the total investment in all the capital stock in all the banks in Kentucky is approximately $64,000,000; that the individual citizens of Scott County, Kentucky, had made investments in competition with the banks of Scott County to an amount of approximately $1,000,000, while the investments in the capital stock of all the banks of Scott County amounted to only $480,000, and the investments in the capital stock of the national banks of that county amounted to only $220,000.00, and the Circuit Court through the Chancellor so held. [fols. 241 & 242]

T. Kennedy Helm, J. Craig Bradley, James Bradley, Attorneys for Plaintiff-in-error.

[File endorsement omitted.]

[fol 243] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed March 25, 1925

To the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky, and the Associate Justices of said Court:

Now comes The Georgetown National Bank, an national banking association organized under the Act of Congress and located in Georgetown, Scott County, Kentucky, Plaintiff in the above cause, and would show to this Honorable Court that in the record and proceedings and rendition of the Decree in the above cause by the Court of Appeals of the Commonwealth of Kentucky, it being the highest Court of said State in which a decision could be had, the said suit between The Georgetown National Bank and Ollie McFarland, Sheriff of Scott County, Kentucky, The Fiscal Court of [fol. 244] Scott County, Kentucky, composed of J. B. Ward, County Judge, Clayton Thomason, County Commissioner, T. K. Shuff, County Commissioner and L. F. Aulick, County Commissioner, manifest error has occurred greatly to its damage whereby petitioner feels aggrieved;

That in the record and proceedings it will appear that there was drawn in question the validity of a statute, towit, Section 4019a-10, of said Commonwealth, and the authority exercised under said State by the aforesaid defendants-in-error, on the ground of the repugnance thereof to the Constitution and the laws of the United States, and especially the Act of Congress, Section 5219, all of which is apparent in the records and proceedings of the case, and specifically set forth in the Assignment of Errors filed herewith.

Wherefore your petitioner prays that its appeal be allowed and that a transcript of the record, proceedings and paper upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

Georgetown National Bank, by T. Kennedy Helm, J. Craig [fols. 245 & 246] Bradley, James Bradley, Its Attorneys in Law and in Fact.

[File endorsement omitted.]

[fol. 247] IN COURT OF APPEALS OF KENTUCKY

WRIT OF ERROR—Filed March 25, 1925

The President of the United States of America to the Honorable Judges of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said Court of Appeals of Kentucky, before you or some of you, being the highest court of law or equity of the said Commonwealth, in which decision could be had, in the said suit between The Georgetown National Bank and Ollie McFarland, Sheriff of Scott County, Kentucky, and The Fiscal Court of Scott County, Kentucky, composed of J. B. Ward, County Judge, Clayton Thomason, County Commissioner, T. K. Shuff, County Commissioner and L. F. Aulick, County Commissioner, wherein was drawn in question the validity of a statute of or an authority exercised under such State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and the decision was against the title, right, privilege and immunity specially set up and claimed under the said Constitution and statute of the United States, and manifest error has happened to the great damage of the plaintiff-in-error, as is said and appears by its complaint; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this Writ, so that you have the same in said Supreme Court at Washington within thirty (30) days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fols. 248-250] Witness the Honorable William Howard Taft, Chief Justice of the United States, this 25 day of March in the year of our Lord one thousand nine hundred and twenty-five.

J. W. Menzies, Clerk United States District Court, Eastern District of Kentucky, by Lillian M. Wiard, D. C. (Seal U. S. District Court, East. Dist. of Ky., U. S. of America.)

The above Writ is allowed by Warner E. Settle, Chief Justice Court of Appeals of Kentucky.

[fols. 251 & 252] BOND ON WRIT OF ERROR FOR $5,000.00—Approved March 25, 1925; omitted in printing

[fol. 253] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed March 25, 1925

On this, the 25 day of March A. D. 1925, came on to be heard the application of The Georgetown National Bank, said plaintiff being represented by counsel, for a Writ of Error, and it appearing to the Court, from the petition filed herein and the record filed therewith, that the application ought to be granted and that a transcript of the record and proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is, therefore, ordered that the Writ of Error be allowed upon the plaintiff's giving bond, conditioned as the law directs, in the sum of Five Thousand ($5,000.00) Dollars, which bond shall operate as a supersedeas of the judgment; and that a true copy of the record, assignment of errors and all proceedings had in the case in the Court of Appeals of the Commonwealth of Kentucky, shall be transmitted to the Supreme Court of the United States, properly certified, as the law directs, that the said Court may inspect the same and do what according to law should be done.

[fols. 254 & 255] Witness the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky, this 25 day of March, 1925.

Warner E. Settle, Chief Justice, Court of Appeals of Kentucky.

[fol. 256] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 30, 1925

It is hereby stipulated and agreed by the parties hereto in regard to the printed pamphlet filed with Ben Marshall's deposition, being the fifth annual report of the Kentucky State Tax Commission for 1922, as follows:

1. That the above exhibit referred to in the evidence was made and signed by the State Tax Commission to the Governor, and is pursuant to law.

2. That only the following parts of the report are pertinent to this case:

A complete list of the counties of the State as they are given and numbered in the report as shown by columns 1-2 on pages 8-24-40.

The value of timber, improvements and land for each county as indicated in column 1 on pages 9-25-41.

The total value of lots and improvements for each county is indicated by column 4 on pages 10-28-42.

The total value of lots and improvements for each county is indicated by column 4 on pages 10-26-42.

[fol. 257] The total value of all intangible personal property for each county; the total value of bank shares; the total amount of exemptions for each county, and the grand total of all property subject to taxation (including intangibles and bank shares) for state purposes as indicated by columns 3-4-5-6 on pages 20-36-52.

Table number 2 on page 56-57.

Table number 8 on page 78.

It is further stipulated and agreed that the clerk of Court of Appeals in copying and certifying this record to the Supreme Court of the United States shall only keep the above po-tion of said exhibit. He will copy those portions in the same form as they are printed in said report.

Bradley & Bradley, Attys. for Georgtown National Bank.
H. C. Ford, County Attorney, Scott County, Kentucky, and Attorney Representing the Above-named Defendant.

[File endorsement omitted.]

[fol. 258]

Table No. 8

Total of All Property in Kentucky Subject to Taxation for State Purposes

Lands, timber and improvements	$736,271,726 @ 40c.	$2,945,086.90
Mineral rights and leases	21,172,383 @ 40c.	84,689.53
Town lots and improvements	438,132,922 @ 40c.	1,752,531.69
Tangible personal property other than live stock and bank shares	276,087,129 @ 40c.	1,104,348.52
Bank shares	64,183,735 @ 40c.	256,734.94
Live stock	31,682,831 @ 10c.	31,682.83
Intangible personal property	309,704,155 @ 40c.	1,238,816.62
Total	$1,877,234,881	$7,413,891.03
Bank deposits	$270,121,440 @ 10c.	$270,121.44
Building and loan association stock	32,081,050 @ 10c.	32,081.05
Railroad tangible property	125,234,264 @ 40c.	500,937.06
Railroad franchise assessment	52,594,559 @ 40c.	210,378.23
Franchise assessment of other corporations	29,512,471 @ 40c.	118,049.88
Distilled spirits in bonded warehouses, 434,201 bbls. @ $40	17,368,040 @ 40c.	69,472.16
Total property and tax thereon	$2,404,146,705	$8,614,930.85

[fol. 259]

Table No. 2

A Tabulation Showing the Assessment and Valuation of the Various Kinds of Property Listed as of July 1st, 1921, for Taxation for 1922, and the Amount of Revenue Derived from Each Kind and Character of Property so Listed

Kind of property		Assessed valuation	Revenue paid
Farm lands, including timber and improvements		$736,271,726	$2,945,086.90
Mineral rights and leases		21,172,383	84,689.53
Town lots and improvements		438,132,922	1,752,531.69
Total assessment and tax on real estate		$1,195,577,031	$4,782,308.12
Wines, whiskeys and brandies		267,595	1,070.38
Stores and stocks of merchandise		60,232,026	240,928.10
Raw material, not at plant		5,424,244	21,696.98
Bees		124,756	499.02
Mechanics' tools		810,404	3,241.62
Automobiles		22,113,159	88,452.64
Motor trucks		3,489,164	13,956.66
Motor ambulances and hearses		257,722	1,030.89
Carriages and other vehicles		1,826,728	7,306.91
Provisions		1,178,820	4,715.28
Furniture and fixtures not in residence		4,621,884	18,487.54
Musical Instruments		5,361,523	21,446.09
Paintings and pictures		254,320	1,017.28
Libraries and books		775,778	3,103.11
Jewelry		2,942,298	11,769.19
Household and kitchen furniture	$28,000,718		
Less exemptions allowed persons with a family	$25,469,139		
		2,531,579	10,126.32

Kind of property		Assessed valuation	Revenue paid
Gold, silver and plated ware		657,633	2,630.53
Telephone systems		1,793,039	7,172.16
Machinery and implements not used in farming		5,130,861	20,523.44
Boilers, steam and gas engines not used in manufacturing		1,389,699	5,558.80
Boats and water crafts		11,854,125	47,416.50
Mineral products		885,408	3,541.63
Quarries, gas and oil wells, etc		405,760	1,623.04
Coal mine equipment		18,780,201	75,120.80
Patent rights and trade marks		423,837	1,695.35
Building and other materials		2,919,301	11,677.20
Miscellany		33,525,206	134,100.82
Any and all other property	$9,173,305		
Less exemptions therefrom	5,143,408		
		4,029,897	16,119.59
Agricultural implements	$9,998,103		
Less exemptions therefrom	977,812		
		9,020,291	36,081.16
Manufacturing machinery		21,018,485	84,073.94
Raw material at plant		28,828,514	115,314.06
Agricultural products		23,212,872	92,851.49
Total assessment of tangible personal property, after deducting exemptions		$276,087,129	$1,104,348.52
[fol. 260] Live stock	$57,495,823		
Less exemptions	25,812,992		
		31,682,831	31,682.83
Intangible personal property		309,704,155	1,238,816.62
Bank shares		64,183,735	256,734.94
Total assessments as of July 1, 1921		$1,877,234,881	....
Total revenue therefrom			$7,413,891.03
Farm lands paid in taxes			$2,945,086.90
Mineral rights and leases			84,689.53
Town lots and improvements			1,752,531.69
Total paid by real estate			$4,782,308.12
Tangible personal property, other than live stock			$1,361,083.46
Live stock @ 10c. rate			31,682.83
Intangible personal property			1,238,816.62
			$7,413,891.03

BEN MARSHALL EXHIBIT "A"—Continued

Line number	Counties	Total value of lots and improvements	I. Lands, improvements, and timber— Total value of timber, improvements, and land	Total value of all intangible personal property	Total value of bank shares	Total amount of exemptions	Grand total of all property subject to taxation (intangibles and bank shares must be included) for state purposes
1	Adair	$463,740	$3,429,701	$616,481	$263,471	$474,144	$5,356,682
2	Allen	924,670	4,442,149	755,407	94,028	661,202	8,462,905
3	Anderson	1,100,790	3,942,240	726,999	544,481	484,305	7,119,937
4	Ballard	677,594	5,958,542	892,624	162,125	398,516	8,560,021
5	Barren	1,832,255	7,288,042	1,307,087	515,486	817,556	12,493,828
6	Bath	830,247	9,428,539	1,184,274	404,247	258,750	12,630,257
7	Bell	3,627,295	5,503,266	2,262,815	442,356	405,500	15,693,053
8	Boone	1,030,045	9,464,595	863,315	538,170	370,790	13,321,780
9	Bourbon	4,389,675	22,629,605	3,560,215	1,161,892	405,750	35,069,697
10	Boyd	9,886,929	3,623,722	5,422,837	1,483,916	721,924	27,244,529
11	Boyle	4,392,325	8,482,172	5,496,107	645,218	378,949	21,126,243
12	Bracken	1,170,396	6,076,700	554,965	446,958	282,330	8,983,353
13	Breathitt	441,840	2,355,925	57,032	151,288	164,945	3,977,780
14	Breckinridge	1,083,717	4,791,033	778,093	252,128	713,858	8,147,096
15	Bullitt	697,375	4,000,940	809,044	137,926	406,755	6,559,382
16	Butler	292,332	3,304,647	475,184	195,661	363,500	4,908,825
17	Caldwell	1,302,537	3,154,619	742,620	501,192	530,313	6,476,918
18	Calloway	1,343,745	7,060,611	1,125,437	175,909	905,257	10,956,703
19	Campbell	24,596,365	5,571,441	6,085,010	840,722	199,100	42,857,382
20	Carlisle	536,862	3,881,818	1,038,126	163,405	348,471	6,219,268
21	Carroll	1,380,068	2,815,439	424,337	361,752	146,000	5,856,908
22	Carter	741,469	3,297,854	477,755	303,579	390,577	6,113,306
23	Casey	251,305	4,473,695	277,225	117,565	188,675	5,654,135
24	Christian	5,833,684	13,117,840	5,478,181	815,210	620,980	29,527,858
25	Clark	4,999,670	15,070,450	3,040,365	1,134,720	487,750	27,619,360
26	Clay	209,190	3,398,913	354,092	102,071	372,112	4,898,274
27	Clinton	134,155	1,650,753	208,979	47,120	146,621	2,307,290
28	Crittenden	884,325	3,700,595	717,920	126,470	528,240	6,614,415
29	Cumberland	169,530	2,549,140	290,873	80,458	335,247	3,499,326

[fol. 261]

BEN MARSHALL EXHIBIT "A"—Continued

Line number	Counties	Total value of lots and improvements	I. Lands, improvements, and timber—Total value of timber, improvements, and land	Total value of all intangible personal property	Total value of bank shares	Total amount of exemptions	Grand total of all property subject to taxation (intangibles and bank shares must be included) for state purposes
30	Daviess	7,495,543	14,690,335	4,790,121	1,304,519	721,200	36,781,373
31	Edmonson	72,850	2,765,060	310,964	50,536	448,123	3,824,772
32	Elliott	34,015	1,233,709	90,060	14,474	288,523	1,646,160
33	Estill	1,416,679	2,055,172	511,586	87,925	399,963	5,584,139
34	Fayette	34,448,252	27,466,963	17,751,382	4,137,790	727,750	98,508,775
35	Fleming	1,357,351	8,857,746	1,152,831	415,706	657,779	13,028,586
36	Floyd	793,210	3,415,519	212,877	181,337	808,049	9,619,660
37	Franklin	4,433,844	6,673,715	4,094,163	896,174	418,710	18,812,559
38	Fulton	2,417,175	4,960,200	1,138,782	521,907	591,330	10,882,210
39	Gallatin	360,382	1,822,313	336,944	107,782	175,334	3,015,171
40	Garrard	1,149,211	9,966,023	2,105,849	361,485	398,500	14,938,734
[fol. 262]							
41	Grant	1,024,007	6,445,134	539,911	495,141	298,606	9,142,615
42	Graves	3,455,538	13,074,816	4,227,414	792,078	828,500	24,215,658
43	Grayson	785,480	4,126,615	681,297	201,334	422,613	6,644,191
44	Green	241,796	2,639,524	269,689	100,518	396,583	3,550,839
45	Greenup	1,322,136	2,675,368	549,973	145,993	471,970	5,729,962
46	Hancock	322,017	2,361,860	207,568	75,466	198,126	3,445,997
47	Hardin	1,874,037	7,258,207	2,175,338	496,891	462,535	13,099,352
48	Harlan	2,162,435	11,073,715	1,313,505	182,440	924,550	21,203,100
49	Harrison	3,100,125	12,398,145	2,146,425	638,385	681,595	19,966,850
50	Hart	922,713	4,910,991	881,147	246,837	654,455	7,826,382
51	Henderson	5,400,635	14,120,430	3,770,055	1,199,153	978,945	29,031,388
52	Henry	1,675,610	8,483,998	1,348,035	415,782	374,825	13,049,693
53	Hickman	614,027	5,720,605	1,057,889	154,728	303,500	8,280,503
54	Hopkins	4,003,890	7,024,494	1,417,411	457,434	495,606	16,324,214
55	Jackson	58,819	1,827,492	191,524	44,495	459,100	2,699,122
56	Jefferson	171,162,442	28,770,860	131,262,883	17,761,205	4,383,000	459,420,997
57	Jessamine	1,577,271	10,284,195	2,112,660	679,080	258,230	15,609,549

58 Johnson	1,051,464	2,701,510	571,469	431,006	702,628	7,396,777
59 Kenton	29,467,645	6,392,805	9,024,314	2,249,275	268,725	53,118,867
60 Knott	61,275	2,389,326	181,253	21,476	364,061	4,283,913
61 Knox	1,272,716	3,923,203	822,550	181,595	470,500	7,534,680
62 Larue	603,471	2,798,511	673,424	177,801	374,609	5,903,549
63 Laurel	638,015	2,993,279	247,607	108,625	693,223	4,752,274
64 Lawrence	893,685	3,100,512	309,485	219,738	666,047	6,247,554
65 Lee	312,180	1,299,608	191,702	74,089	215,525	4,286,979
66 Leslie	83,620	3,079,229	99,567	18,658	156,545	3,979,194
67 Letcher	1,091,739	6,807,644	543,037	243,240	840,515	12,895,304
68 Lewis	435,430	3,229,808	272,536	61,840	319,923	4,735,012
69 Lincoln	1,243,098	8,161,043	1,230,247	494,524	359,473	12,294,558
70 Livingston	365,623	3,070,977	554,955	175,146	398,042	4,869,830
71 Logan	2,172,730	8,644,610	2,222,350	339,092	509,470	15,150,352
72 Lyon	445,310	2,423,041	337,177	90,065	319,862	3,913,135
73 Madison	3,547,220	15,478,020	3,805,270	881,830	462,870	25,846,470
74 Magoffin	169,485	2,028,333	230,819	46,615	387,078	3,830,341
75 Marion	1,549,144	5,953,063	1,890,098	554,517	336,250	10,950,055
76 Marshall	484,550	4,572,372	977,277	195,436	339,975	6,832,056
77 Martin	247,846	1,465,312	104,983	50,668	269,062	2,998,624
78 Mason	4,616,715	11,738,995	2,466,071	733,183	262,750	23,616,414
79 McCracken	10,233,870	6,033,830	5,249,300	819,370	420,500	28,007,275
80 McCreary	138,487	2,529,368	541,067	47,814	417,120	4,277,266
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81 McLean	868,803	5,085,995	412,410	202,766	151,250	7,561,361
82 Meade	281,166	2,669,085	328,484	45,888	220,925	4,366,409
83 Menifee	34,985	1,032,812	82,686	......	193,585	1,663,444
84 Mercer	2,038,751	10,408,450	2,038,811	525,738	614,006	16,622,308
85 Metcalfe	149,090	2,361,309	276,219	64,017	388,448	3,191,976
86 Monroe	331,288	2,787,053	405,780	170,548	296,472	4,219,145
87 Montgomery	2,296,000	7,738,075	2,479,660	515,770	218,750	14,426,225
88 Morgan	205,835	3,245,265	249,427	88,809	619,332	4,825,176
89 Muhlenberg	2,159,518	4,306,768	1,311,044	287,919	1,161,307	11,092,669
90 Nelson	1,827,835	9,174,433	3,227,823	529,202	418,500	16,470,543
91 Nicholas	989,735	7,726,030	1,627,256	242,958	414,080	11,314,000
92 Ohio	1,204,525	7,247,725	694,420	265,710	787,250	11,743,805
93 Oldham	917,026	5,607,222	1,709,977	153,098	322,032	9,131,213

Ben Marshall Exhibit "A"—Continued

Line number	Counties	Total value of lots and improvements	I. Lands, improvements, and timber—Total value of timber, improvements, and land	Total value of all intangible personal property	Total value of bank shares	Total amount of exemptions	Grand total of all property subject to taxation (intangibles and bank shares must be included) for state purposes
94	Owen	537,625	6,158,380	377,120	314,910	267,186	7,936,339
95	Owsley	31,570	1,299,441	81,120	30,823	273,252	1,685,093
96	Pendleton	813,205	6,613,459	723,941	357,294	552,550	9,512,524
97	Perry	2,152,171	3,674,256	510,954	280,961	269,817	13,941,801
98	Pike	1,927,842	7,503,403	1,577,950	647,952	1,152,083	19,698,726
99	Powell	200,700	1,285,069	281,267	71,779	208,286	2,394,448
100	Pulaski	2,186,450	4,882,093	507,510	549,833	1,025,037	9,701,893
101	Robertson	165,560	2,289,422	47,455	60,242	172,236	2,728,231
102	Rockcastle	477,512	2,101,230	194,767	98,443	500,315	3,419,930
103	Rowan	359,862	1,223,118	432,749	67,575	339,669	2,848,415
104	Russell	139,596	2,162,574	333,513	78,039	212,786	3,085,978
105	Scott	2,523,920	13,952,669	1,617,616	539,466	411,500	20,070,323
106	Shelby	2,906,380	16,410,441	3,739,292	785,327	372,330	25,850,629
107	Simpson	1,429,364	4,535,798	1,384,991	193,023	298,377	8,629,661
108	Spencer	457,414	5,314,938	693,904	149,420	297,664	7,235,130
109	Taylor	636,580	2,775,435	759,714	117,342	375,050	4,962,234
110	Todd	1,087,415	5,092,343	940,683	369,642	318,244	8,359,989
111	Trigg	434,942	3,659,605	890,249	176,249	356,890	5,763,630
112	Trimble	153,590	2,816,205	177,561	96,891	251,140	3,554,667
113	Union	2,038,790	12,910,467	2,437,464	484,744	406,620	20,543,192
114	Warren	6,698,625	12,931,529	3,291,763	1,046,584	494,305	26,892,274
115	Washington	822,665	6,892,135	1,698,201	371,643	297,250	10,509,406
116	Wayne	571,917	3,868,542	820,241	181,392	556,599	6,751,318
117	Webster	2,036,365	5,259,120	830,935	440,655	325,000	10,562,970
118	Whitley	2,098,117	3,081,871	1,120,925	320,588	995,742	8,205,174
119	Wolfe	152,957	1,474,983	75,715	70,096	269,526	2,378,203
120	Woodford	1,676,293	13,330,339	4,094,318	596,407	305,090	21,624,894
	Totals	$438,132,922	$736,271,726	$309,704,155	$64,183,735	$57,403,351	$1,877,234,881

[fol. 265] CITATION—In usual form, showing service on H. C. Ford; filed Apr. 4, 1925; omitted in printing

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[fol. 266] IN COURT OF APPEALS OF KENTUCKY

RETURN TO WRIT OF ERROR

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the record with all things touching the same as appears from the records and files of my office, in the case of The Georgetown National Bank, appellee and Plaintiff in Error, against Ollie McFarland, Sheriff, etc., Appellant and Defendant in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office: Done at Frankfort, Kentucky, on this the 17th day of April, A. D., 1925.

Jno. A. Goodman, Clerk of the Court of Appeals of Kentucky. (Seal Court of Appeals, Kentucky.)

Fee, $91.80.

Endorsed on cover: File No. 31,067. Kentucky Court of Appeals. Term No. 377. The Georgetown National Bank, plaintiff in error, vs. Ollie McFarland, Sheriff of Scott County, Kentucky; The Fiscal Court of Scott County, Kentucky, etc., et al. Filed April 22nd, 1925. File No. 31,067.

3

FILED
APR 30 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925.

No [redacted] 78

GEORGETOWN NATIONAL BANK, *Plaintiff-in-Error,*

vs.

OLLIE M. McFARLAND, Sheriff of Scott
County, Kentucky;
THE FISCAL COURT OF SCOTT COUNTY, KENTUCKY, ETC., ET AL., *Defendants-in-Error.*

BRIEF FOR PLAINTIFF-IN-ERROR.

J. Craig Bradley,
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James Bradley,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 377.

GEORGETOWN NATIONAL BANK, - *Plaintiff-in-Error,*

vs.

OLLIE M. MCFARLAND, SHERIFF OF
SCOTT COUNTY, KENTUCKY;
THE FISCAL COURT OF SCOTT COUNTY,
KENTUCKY, ETC., ET AL., - *Defendants-in-Error.*

BRIEF FOR PLAINTIFF-IN-ERROR.

This case is here by a writ of error to the Court of Appeals of Kentucky (R. 118). The judgment of the State Court of last resort complained of (R. 109) was entered February 24, 1925 (reversing the judgment of the Scott Circuit Court (R. 31), which had held that the Kentucky Statutes, Section 4019a-10, was in violation of and repugnant to Section 5219 of the United States Revised Statutes and of the Fourteenth Amendment to the Constitution of the United States), holding that there was no repugnancy to or violation of the Federal law and directing the entry of judgment for the defendants. The opinion of the Court of Appeals of Kentucky is officially reported as follows: O. McFarland, Sheriff, v. Georgetown National Bank, 208 Ky. 7.

CLAIMS AND RULINGS.

The State of Kentucky has no income tax law. All property, not exempt by the Constitution, is subject to **ad valorem** taxation. The Legislature has the power to classify property and limit the rates for the State and local taxes or totally withhold it from local taxation. It has made a class of all taxable stocks, bonds, secured and unsecured notes, accounts and other credits, which is subject to only 40 cents per $100 for State purposes but excepted from this class of all intangible property **only** bank shares, shares in life insurance companies and corporate franchises. The latter are taxable at rates from $2.70 to $3.60 per $100. A discrimination between intangible personal property generally and bank shares of 700% to 900%. The defendant-in-error as Sheriff of Scott County, Kentucky, threatened distraint for back taxes on "corrected" tax bills for the years 1919 to 1922 inclusive.

The plaintiff-in-error, a national bank, brought this suit on behalf of its numerous shareholders against whom the Sheriff was threatening summary proceedings for the collection of local taxes for the years 1919, 1920, 1921 and 1922. The Chancellor held that Section 4019a-10 of the Kentucky Statutes was in violation of, and repugnant to, the Fourteenth Amendment and Section 5219 of the U. S. Revised Statutes, on the ground that under the State law **all** intangible personal property, including all "other moneyed capital in the hands of individual citizens" in the State of Kentucky, was subject to taxes for State purposes alone at the rate of 40 cents per $100 and totally exempted from local taxation, while, by the **express wording of the statute,** bank shares and corporate franchises were excepted from the exemption and made subject to all local taxes. In the case of the plaintiff-in-error this exception made its shares subject to aggregate rates ranging from $2.70 to $2.80 per $100 for the years in question. Of the added sums the city receives $1.65, the county 50 cents, and the county for road tax, 20 cents per $100 of valuation, though only the county general and road taxes were before the Court in this suit.

Plaintiff-in-error alleged (R. 3-4-5) and the Chancellor in the lower court, in substance, held (R. 32) that there were in the hands of at least 250 individual citizens and residents of Scott County, moneyed capital invested in taxable **notes, bonds and other credits secured by pledge, mortgage or otherwise, or unsecured,** of an assessed value of more than $1,540,244—a material amount—which came into direct and active competition with the bank shares of the plaintiff-in-error of an assessed value of $144,771, and with the assessed value of the shares of stock of all the State and national banks in Scott County of $539,466.00.

It was also shown that in the State of Kentucky there was assessed taxable intangible personal property (or moneyed capital) exclusive of bank shares, amounting to $309,764,155, whereas the total assessed value of the shares of stock of all the State and national banks and trust companies in Kentucky is only $64,183,735. It was alleged and found that such taxable intangible personal property (moneyed capital) in the hands of individual citizens was of the same class and character as the bank shares, was material in amount and came into competition therewith. The premises considered, the plaintiff-in-error claimed and the Chancellor held, as all of said taxable intangible personal property in the hands of individual citizens is exempted from any local taxation and only the shares of stock in banks and trust companies in the hands of their shareholders are subjected to local rates of taxation, that, because of such discrimination, the Kentucky Statutes, Section 4019a-10 is repugnant to United States Revised Statutes, Section 5219, and to the Fourteenth Amendment of the Constitution of the United States (R. 32).

The plaintiff's petition was to enjoin the collection of additional county taxes for the tax years 1919, 1920, 1921 and 1922, based upon the assessment of property for said years as of July 1st each preceding year. By stipulation it was agreed (R. 22) that proof should be taken for the tax year 1922 based on the assessment of July 21, 1921, which should be considered and treated by the Court as applying to all of the years in controversy.

The Court of Appeals of Kentucky reversed the judgment of the lower court and directed judgment for the defendant (R. 109-114), holding that the amendment by Congress of March 4, 1923, to Section 5219 of the Revised Statutes was self-executing retroactively without curative State legislation and authorized the collection of such taxes; that the plaintiff-in-error's evidence did not without dispute establish competition of other moneyed capital; and that some exemption of moneyed capital was within the power of the State under this Court's decisions; and, therefore, that the Kentucky Statutes, Section 4019a-10, was not violative of Section 5219 of the United States Revised Statutes, but valid.

JURISDICTION.

The jurisdiction of this Court is given by Section 237 of the Federal Judicial Code, amended and continued by the Act of Congress of February 13, 1925, and is sustained by this Court's decisions in Merchants National Bank v. Richmond, 256 U. S. 635-637; and First National Bank of Guthrie Center v. Anderson, County Auditor, et al. (decided January 4, 1926, not yet officially reported), 46 Supreme Court Reporter, 135.

CONDENSED ASSIGNMENT OF ERRORS (R. 115).

(In full in Appendix, p. 79.)

First and Second. The Court erred in holding Kentucky Statutes, Section 4019a-10, not void as violative of U. S. Rev. Stat., Sec. 5219, and the Fourteenth Amendment, and in holding that it did not deprive plaintiff-in-error of its rights, privileges and immunities.

Third. The Court erred in holding that the Act of Congress, approved March 4, 1923, as an amendment of Section 5219, was retroactive without legislative action by the States to make valid the collection of taxes.

Fourth. The Court erred in interpreting and construing Rev. Stat., Sec. 5219.

Fifth. The Court erred in interpreting and construing the Act of Congress of March 4, 1923, amending Rev. Stat., Sec. 5219.

Sixth. The Court flagrantly erred in its finding of facts as to competition of other moneyed capital with national bank shares and the investment of the proceeds thereof.

ARGUMENT.

I.

SHORT STATEMENT.

In 1891 Kentucky adopted a new Constitution which provided in Sections 171 and 172 for uniform **ad valorem** taxation of all property. By an amendment in 1916 to Section 171 the General Assembly was empowered to classify property and to prescribe the same rate of taxation for "each class."

At an Extraordinary Session of the General Assembly in 1917 the tax laws only were revised. A State Tax Commission was created with broad powers to prescribe forms and enforce the law and to prescribe the forms for taxpayers' reports, county tax commissioners' recapitulations and county clerks' form for bills to be collected by the sheriffs (to be commented upon later).

The General Assembly "classified property" **by Section 4019a-10 and subordinate sections.** Kentucky is an agricultural and live stock State but it was realized by the General Assembly that manufacturing should be encouraged.

The classification laws adopted by the General Assembly made four classes of property. The sections of the Kentucky laws are printed in the appendix (p. 71);

The first class for lesser taxation (*i. e.,* at 10 cents per $100 for State purposes only) embraces bank deposits, stock in building and loan associations and live stock;

The second class for lesser taxation (*i. e.,* at 40 cents per $100 for State purposes only) embraces farm implements and farm machinery; raw products in the course of manufacture and machinery of those engaged in manufacturing, and **"money in hand, notes, bonds, accounts and other credits whether secured by mortgage, pledge or otherwise, or unsecured,"** and shares of stock in corporations not relieved from taxation because 25% of their property is located and taxable in Kentucky under Section 4088.

The third class for lesser taxation embraces agricultural products in storage (such products being exempt in the hands of the original producer for the first year), the taxation of which was limited to 40 cents for State purposes, 15 cents for county purposes and 15 cents for city purposes, per $100, or a total of 70 cents;

The fourth class embraces all other property not otherwise exempt or the local rates of tax thereon limited. Such property bears rates levied from year to year for the purposes of State, county, city and districts of schools, roads, drainage, etc., aggregating from $2.50 to $3.60 per $100 of valuation. In this fourth class, with the general mass of taxable property, were placed (of all the intangible personal property in the State, only) corporate franchises, shares of stock in banks and trust companies and shares in domestic life insurance companies.

For the sake of clearness we repeat that in the second class subject only to the State rate of 40 cents per $100 and exempt from all other taxation is embraced "money in hand, notes, bonds, accounts and other credits whether secured by mortgage, pledge or otherwise, or unsecured," and "shares of stock not relieved from assessment under Section 4088 of this act" (that is shares of corporate stock where such corporations have not as much as 25% of their property located and taxed in Kentucky).

And Section 4019a-10 continues as to the second class:

> "provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks and trust companies doing business in Kentucky or domestic life insurance companies.
>
> "And provided further every State bank and trust company incorporated under the laws of this Commonwealth and every national bank doing business therein and located in any county, city, town or taxing district in this Commonwealth, shall make to the assessing officer of the county, city, town or taxing district, a report showing the following facts * * *."

And as to banks the provision was and is Kentucky Statutes, Section 4092, as follows:

> "in addition thereto the said banks and trust companies shall pay to the local authorities in said counties, cities, towns and taxing districts taxes at the same rate imposed upon other personal property therein."

The provisions of Kentucky Statutes, Section 4019a-10, further provide for the reports and taxation of bank shares in provisions twice as long as all the other provisions classifying property. Therefore, no unintentional or casual discrimination in the taxation of bank shares can be assumed.

That bank shares were not omitted by the General Assembly from local taxation must be admitted but that the State Tax Commission evidently thought, when it inaugurated the new tax system, that they should be omitted, by its contemporaneous and practical construction of the new law, to accord with the laws of the United States, is plain from the fact that the blanks prescribed by the State Tax Commission (R. 212, *et seq.*) did not include a schedule for the local taxation of bank shares.

The Court will observe that there are listed various items for State taxation such as:

> "1. Agricultural implements.
> 2. Manufacturing machinery.
> 3. Raw materials at plant.
> 4. Intangible property.
> 5. Agricultural products subject to county rate of 15 cents."

And also this statement:

> "Items in numbers 1, 2, 3 and 4 not subject to county taxation. Item No. 5 subject to a county rate of 15 cents per $100."

The Court will also observe that in the corrected bills bank shares are listed as "**tangible** property other than live stock and poultry."

It is not surprising, therefore, that in many counties of the State bank shares were not discriminated against "as moneyed capital" until after this Court's decision in the Richmond bank case (June 6, 1921), 256 U. S. 635. Thereafter, in the summer of 1922, various county officials upon an examination of the Kentucky Statutes, believing that the local jurisdictions should have collected local taxes, made out "corrected" tax bills for the years 1919, 1920 and 1921, and included bank shares in the tax bills for 1922 (R. 95).

The suit at bar results from the attempted collection of back taxes on "corrected" tax bills for 1919, 1920 and 1921, on bank shares for those years and the original tax bill for the year 1922, against the plainti-in-error as the agent for its stockholders. It brought this suit upon the allegations above stated to enjoin the defendant Sheriff from the collection of such county taxes by summary process.

The defendant's answer traversed the material allegations of the petition.

The plaintiff-in-error contended, and still contends, first, that when, by the Kentucky Statutes, **all moneyed capital** in the State, was exempted **from any local taxation,** excepting only shares of bank stock, against the owners thereof, there was, **as a matter of law,** an unlawful discrimination in violation of United States Revised Statutes, Section 5219; and, secondly, that **as a matter of fact,** in Scott County, Kentucky, and generally throughout the State, individual citizens employed moneyed capital in a material amount in competition with the investments of national bank shareholders and the Circuit Court so found and held, but the Court of Appeals found no competition either in law or in fact in view of the Congressional Amendment of March 4, 1923, of United States Revised Statutes, Section 5219.

The Revised Statutes, Section 5219, as it originally existed and as amended, are printed in parallel columns in the appendix hereto (p. 76).

Under the Kentucky law the State Tax Commission prescribed the forms for reports of taxpayers and the terms of the bills to be sent to taxpayers by assessing officers (Kentucky Statutes, Section 4114i-11). The reports made by the taxpayers are not in detail as to the nature of their investments but only under general heads, and even these are confidential (Kentucky Statutes, Section 4114i-13), and can only be produced in evidence upon a Court order for a **subpoena duces tecum,** which was obtained in the case at bar (R. 21) against the Secretary of the State Tax Commission to produce the individual lists of the taxpayers in Scott County, Kentucky, reporting intangible personal property for taxation.

These individual lists tabulated under the prescribed headings on the forms for the taxpayers' reports are, by the Secretary of the State Tax Commission, shown for Scott County, Kentucky, as follows (R. 39 to 51):

296 citizens or firms reported taxable intangible personal property in Scott County, Kentucky. These reports disclose that they so reported:

Bonds	$188,280.00
Stock in corporations	38,450.00
Secured notes	1,060,726.00
Unsecured notes	159,111.00
Accounts	74,760.00
Other intangibles (choses in action)	18,917.00
Total	$1,540,244.00

The evidence clearly shows that under the system of taxing intangible personal property in Kentucky only about 30% to 40% thereof is found in the assessment rolls. (Hambrick, R. 58; Abbott, R. 77; Nichols, R. 80, 81. See, also: L. & N. R. R. Co. v. Bosworth, 209 Fed. 380, 459; L. & N. R. R. Co. v. Bosworth, 230 Fed. 191, 229. Affirmed 244 U. S. 522.)

The evidence also shows that the total value of the shares of stock of all the banks in Scott County, Kentucky, was $539,466.00

In which was included the valuation of the shares of stock of the plaintiff-in-error of................................... $144,772.95

That for the State, all the counties, it was shown all taxable reported intangible personal property, exclusive of bank shares, was assessed at........... $309,704,155.00

And the total valuation of the shares of stock of all the banks and trust companies in Kentucky was............... $64,183,735.00

In the testimony of the Secretary of the State Tax Commission all of the totals of these items are given in detail **as to each county of the State** (R. 123 to 126), from which it appears that on the average the reported taxable intangible personalty (of firms and individual citizens using moneyed capital), is approximately **five times as great** as the total valuation of shares of stock in banks. All of the former property is taxed at only 40 cents per $100, and all of the bank's shares are proposed to be taxed at from $2.70 to $3.60 per $100—a discrimination of about 700% to 900%.

It will be noted that of the taxable intangible personal property in the hands of individual citizens and firms of Scott County, Kentucky, $1,408,177 out of $1,540,244 is represented by **bonds, secured notes and unsecured notes,** which are clearly moneyed capital, and the testimony to be considered later shows that at least $500,000 of the secured notes (R. 96-98) and at least $112,300 of the unsecured notes (R. 91, 93), were known to be investments or loans made by bank customers to bank customers and the very class of investments which the banks were making and seeking.

Five experienced bank executive officers, one from each of the five banks in Scott County, Kentucky, testified that all the banks of Scott County invested large amounts and a large proportion of their funds in mortgages and purchase lien notes; that the competition of individual citizens of the county constantly in the market for such securities was serious and material; and that the individual citizens' investments of their moneyed capital in such securities in that county represented as much as the total of any two banks in the county.

See testimony of:

G. T. Hambrick, Vice President and Cashier of plaintiff-in-error, in the banking business for 25 years (R. 58, 90, 91);

W. A. Hinton, 51 years of age, Cashier Farmers Deposit Bank, Sadieville (R. 75);

W. G. Abbott, Cashier First National Bank, Georgetown, for 34 years (R. 77);

C. B. Roberts, Cashier Citizens Bank of Stamping Ground for 26 years (R. 79);

John C. Nichols, 38 years of age, Cashier Farmers Bank & Trust Co. of Georgetown and connected with the same institution since 1907 (R. 81, 93).

This testimony is reviewed below (p. 41) under the sixth assignment of error.

II.

SECOND AND FOURTH ASSIGNMENT OF ERRORS.

That Kentucky Statutes 4019a-19 is void because in contravention of United States Revised Statutes 5219, notwithstanding the Court of Appeals of Kentucky held such State law valid and the Court erred in its interpretation thereof.

In view of this Court's decision in Boyer v. Boyer, 113 U. S. 689, and its recent decisions in Merchants National Bank of Richmond v. City of Richmond, 256 U. S. 635, and First National Bank of Guthrie Center v. Anderson (Jan. 4, 1926), 46 Supreme Court Rep. 135, it would seem unnecessary to review previous decisions, construing United States Revised Statutes, Section 5219, which so far as pertinent to this case provides, in granting authority to the States to tax the shares of stock of national banks:

> "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

However, the statement of Mr. Justice Miller for this Court in People v. Weaver, 100 U. S. 539, 543, clearly shows the purpose of Congress to anticipate and prevent just such discriminatory taxation as is sought to be imposed upon bank shares in Kentucky, wherein it was said:

> "That the provision which we have cited was necessary to authorize the State to impose any tax whatever on these bank shares, is abundantly established by the cases of McCulloch v. Md., Osborn v. Bank, Weston v. Charleston.
>
> "As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the State to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively."

As to what was meant by moneyed capital in the hands of individual citizens, this Court in the Richmond case quotes with approval Evansville Bank v. Britton, 105 U. S. 322, 324, as follows:

> "**Credits, money loaned at interest and demands against persons or corporations, are more purely representative of moneyed capital** than personal property so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. **But the rights, credits, demands, and money at interest,** mentioned in the Indiana statute, from which bona fide debts **may be deducted, all mean moneyed capital** invested in that way."

This Court in the Richmond case also quotes with approval Mercantile Bank v. New York, 121 U. S. 138, as follows:

> "The terms of the act of Congress therefore include shares of stock or other interest owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes **money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character or temporarily with a view** to re-payment and reinvestment. In this way the moneyed capital in

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(The black-face throughout the brief, unless otherwise noted, are our own.)

> the hands of individuals is distinguished from what is known generally as personal property."

In the Richmond case, 256 U. S. 635, the Court, after reviewing the authorities, concludes, page 638:

> "By repeated decisions of this Court dealing with the restriction here imposed, it has become established that while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations, and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, **but investments of individuals in securities that represent money at interest, and other evidences of indebtedness such as normally enter into the business of banking.**"

And continues as follows, page 641:

> "No decision of this Court to which our attention is called has qualified that rule, or construed section 5219 as leaving out of consideration the rate of State taxation imposed upon **moneyed capital in the hands of individual citizens invested in loans or in securities for the payment of money, either for permanent or temporary purposes, where such moneyed capital comes into competition with that of national banks.**"

In the case of First National Bank of Guthrie Center v. Anderson, County Auditor (decided Jan. 4, 1926), 46 Supreme Court Reporter, 135, this Court, after review, in part, of its summary of previous decisions construing Section 5219, said:

> "The term 'other moneyed capital,' in the restriction, is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. Mercantile National Bank v. New York, supra, 157; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 461, 17 S. Ct. 629, 41 L. Ed. 1069.
>
> "Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. Mercantile National Bank v. New York, supra, 155, 157; Palmer v. McMahon, 133 U. S. 660, 667, 668, 10 S. Ct. 324, ss L. Ed. 772; Talbot v. Silver Bow County, 139 U. S. 438, 447, 11 S. Ct. 594, 35 L. Ed. 210.
>
> "The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. **But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction.** People v. Weaver,

100 U. S. 539, 25 L. Ed. 705; Boyer v. Boyer, 113 U. S. 689, 701, 5 S. Ct. 706, 28 L. Ed. 1089; National Bank of Wellington v. Chapman, 173 U. S. 205, 216, 19 S. Ct. 407, 43 L. Ed. 669."

From the foregoing it must be apparent that **when all stocks, bonds, secured notes and unsecured notes,** in the hands of individual citizens and firms in Kentucky are exempted from any local taxation, and only bank shares and the shares in domestic life insurance companies and corporate franchises are subjected to all local taxation, that there is a "clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks."

A review of this Court's decisions leads to the conclusion that where, by State law, all money capital in the hands of individual citizens is exempted from local taxation, and there is excepted from such class only bank shares, or where on the face of the State law moneyed capital of individual citizens is given a preference over investors in national bank shares, such law is void without detailed proof as to the amount of the investments or the nature of the competition. These subjects are not discussed or considered by this Court where under one form of taxation the hostile discrimination appears on the face of the State law and is bound to be presumed to exist if U. S. Rev. Stat., Sec. 5219, is not meaningless in such cases.

People v. Weaver, 100 U. S. 529.
Supervisors v. Stanley, 105 U. S. 305.
Evansville Bank v. Britton, 105 U. S. 322.

Owensboro National Bank v. Owensboro, 173 U. S. 664.
Covington v. First National Bank, 198 U. S. 100.
Citizens National Bank v. Kentucky, 217 U. S. 443.

It is only in cases where the State law has provided either partial exemptions or, as to some forms of property preferential treatment, that this Court has found it necessary to consider whether or not there was a material amount of moneyed capital exempted and as to whether or not such exempted property was competitive. Cases falling in this class are those cited by the Kentucky Court of Appeals, of:

Hepburn v. The School Directors, 23 Wall. 480.
Mercantile Bank v. New York, 121 U. S. 138.
Bank of Redemption v. City of Boston, 125 U. S. 60.

In the Hepburn case this Court, at page 485, carefully pointed out:

> "This is a partial exemption only."

In the Mercantile Bank case, at page 151, this Court, in considering the exempt class, carefully pointed out the partial exemption, and quoted the following words from the Hepburn case:

> "It could not have been the intention of Congress to exempt bank shares from taxation **because some moneyed** capital was exempt."

The same partial exemption of some form of personal property was likewise under consideration in the other cases cited by the Court of Appeals, viz.:

Aberdeen Bank v. Chehalis, 166 U. S. 440.
First National Bank v. Ayers, 160 U. S. 640.

National Bank of Wellington v. Chapman, 173 U. S. 205.

To reach the conclusion that Kentucky Statutes, Section 4019a-10, was valid, the Court of Appeals cites and relies upon (R. 110-112) the cases cited below which can be generally classified and differentiated as follows:

(1) Where the alleged discrimination against bank shares consisted of a preferential rate on a class of property in which banks were not authorized to invest:

Jenkins v. Neff, 186 U. S. 230.
Talbott v. County Commissioners, 139 U. S. 438.

(2) Where the discrimination was alleged to exist because of a preferential exemption of some specified form of personal property:

Mercantile Bank v. New York, 121 U. S. 138.
Bank of Redemption v. City of Boston, 125 U. S. 60.
Hepburn v. The School Directors, 23 Wall. 480.

(3) Or where there was a failure to support the alleged discrimination by pleading or proof:

Aberdeen Bank v. Chehalis, 166 U. S. 440.
First National Bank v. Ayers, 160 U. S. 640.
National Bank of Wellington v. Chapman, 173 U. S. 205.

One or more cases in each of these three classes of cases, cited by the Kentucky Court of Appeals, has been reviewed and differentiated by this Court in Merchants National Bank v. Richmond, 256 U. S. 635-637;

and First National Bank of Guthrie Center v. Anderson, County Auditor, et al., 46 Supreme Court Reporter, 135, quoted from supra. They fall far short of justifying the discrimination against bank shares shown in the Kentucky laws.

In Boyer v. Boyer, 113 U. S. 689, this Court reversed the State Court which had upheld a statute of Pennsylvania subjecting national bank shares to local taxation but exempting a substantial part of other moneyed capital from local taxation. This case seems to be on "all fours" with the case at bar.

It is said, at page 692:

> "Whether the proposed taxation for **county** purposes of the plaintiff's shares of national bank stock is at a greater rate than is assessed for like purposes on other moneyed capital in the hands of individual citizens, is the single question upon which depends the affirmance or reversal of the judgment." (Court's black.)

After pointing out that certain moneyed capital or credits are exempt from local taxation this Court continued, page 699:

> "The burden of county taxation, imposed by the latter act, has, at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which, in its corporate capacity, is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments, and recognizances of every

> kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans however made by corporations which are taxable for State purposes when such corporations pay into the State treasury the required tax on such indebtedness."

After enumerating the classes of property exempt from local taxation by the Pennsylvania law, this Court said, page 701:

> "The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule that it is not absolute equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or equality of taxation cannot in the nature of things be expected or attained under any system. But as substantial equality is attainable, and is required by the supreme law of the land, in respect of State taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere."

And after reviewing its decision in Hepburn v. School Directors, 23 Wall. 480, this Court continued, page 694:

> "It is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation **where a very material part, relatively,** of other moneyed capital in the hands of individual citizens, within the same jurisdiction

> or taxing district, is exempted from such taxation. Indeed, such an interpretation of the statutes might entirely defeat the purpose that induced Congress to confine State taxation of national bank shares within the limit of equality with other moneyed capital; for, it would enable the States to impose upon capital invested in such shares materially greater burdens than those to which other moneyed capital in individual hands is subjected."

It is to be further noted that the partial exemption under consideration in the Hepburn case was a form of investment not at that time permitted to national banks, *i. e.,* investments in real estate mortgages, purchase lien notes and the like, but since that decision, as stated in this Court's opinion in First National Bank of Guthrie Center v. Anderson, 46 Sup. Ct. Rep. 135:

> "The prohibition was partly withdrawn and much of that field was opened to such banks by Act Dec. 22, 1913, c. 6, sec. 24, 38 Stat. 273, and Act Sept. 7, 1916, c. 461, 39 Stat. 754 (Comp. St. sec. 9763)."

Yet the Court of Appeals lays great stress on the Hepburn case in considering the competition in purchase lien notes and mortgage loans as will be noted under V, Sixth Assignment of Errors (p. 41).

Therefore, it is submitted that detailed evidence was unnecessary and the Court of Appeals should have held Kentucky Statutes, Section 4019a-10, invalid insofar as it discriminates against national bank shares in attempting to make such shares only of moneyed capital subject to local taxation in addition to the State taxation which is uniform on both classes.

III.

THIRD AND FIFTH ASSIGNMENT OF ERRORS.

The Court erred in holding that the Act of Congress approved March 4, 1923, as an amendment to Section 5219 was retroactive without legislative action by the State to make valid the collection of taxes previously assessed.

Two views were presented in the lower court.

First, that the Act of Congress was permissive for State legislation to re-enact State laws to conform to the amendment even though such laws might be made retroactive; and

Second, that without legislative action the Sheriff of the county, as an administrative officer of the State charged with the collection of taxes, could represent the State and collect any taxes previously levied and assessed if such taxes could be assessed, levied and collected by the State after the amendment.

Assuming that the amendment of March 4, 1923, to section 5219, extended the State's power to tax national bank shares (which we do not concede but contend the amendment was merely declaratory of the previous law as construed by this Court), the question arises upon the fourth section of the amendment reading as follows:

> "The provisions of section 5219 of the Revised Statutes of the United States as heretofore in

> force shall not prevent the legalizing, ratifying, or confirming **by the States** of any tax heretofore paid, levied or assessed upon the shares of national banks or the collection thereof to the extent that such tax would be valid under said section."

Notwithstanding the views expressed by District Judge Elliott for the Southern District of South Dakota in Minnehaha National Bank v. Anderson, 2 Fed. (2d) 897, 902, construing the amendment as being purely prospective and permissive, the Court of Appeals of Kentucky took the second view, i. e., that the amendment was intended to liberalize the State's rights as construed by this Court in the Richmond case, 256 U. S. 635, supra, and with reference thereto said:

> "After the decision was entered the Congress of the United States passed the following act amending section 5219 of the Revised Statutes" (R. 111).

The amendatory act is then quoted in full and the Court continues (R. 113):

> "The plain purpose of the Act of Congress, approved March 4, 1923, was to remove the uncertainty following the decision of the U. S. Supreme Court in the Virginia case above referred to. To that end it was expressly provided in the Act that 'bonds, notes and other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of

this section.' Under that Act the Kentucky Statute is valid. The 4th section of the Act was added to prevent further confusion in the collection of such taxes, whether levied before or after the passage of the Act. Among other things it expressly provides: 'The provisions of Sec. 5219 of the Revised Statutes of the U. S. as heretofore in force, shall not prevent the legalizing, ratifying or confirming by the States of any tax heretofore paid, levied or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.' The words 'said section' must mean the section as amended by this Act; for else the words 'would be valid' are meaningless; the provision plainly refers to taxes which would be valid under the Act but might not be valid under the original Act. The states needed no authority to collect taxes properly levied under the old Act. The section was intended to give the power to collect taxes levied under the old Act, **if such levy was valid under the amended Act.** This is conclusively shown by the words 'legalizing, ratifying or confirming,' for there was no need to legalize, ratify or confirm previous levies if they were valid under the old statute. The State of Kentucky has ratified and confirmed the taxes heretofore levied and assessed **by collecting them.** This as we know from the current history of the state has been done for the years in question. **Its proceeding by the sheriff** to collect the taxes in question **was an act ratifying and confirming** the taxes theretofore levied and assessed and by the express words of the amendment, section 5219, 'shall not prevent * * * the

> collecting thereof to the extent that such tax would be valid under said section.'
>
> "We therefore conclude that the state statute is valid and that the state has authority to collect the taxes under it. There is no limitation upon the power of Congress to pass an Act of this character authorizing the state to collect taxes previously levied."

Though the opinion of the Court of Appeals of Kentucky does not cite the case, the only authority cited for such conclusion was U. S. v. Heinzer, 206 U. S. 370, in which this Court upheld a retroactive law of Congress for the Philippine tariffs to sustain the validity of action taken by administrative officers after their action had been held invalid. The ground of the decision was that a principal—the United States—had authority to ratify powers previously exercised by its agent, the collecting officers.

This case we submit is no authority for the proposition that where the laws of a State are invalid under an existing Federal statute, such State laws will be revived by a Congressional act removing the limitation upon the State's power. Congress cannot legislate for a State and State legislative action múst be presumed to have been taken and the rights of parties determined in view of the existing law. This is illustrated by the fact that when, by virtue of suits pending to collect back taxes from the banks, the Kentucky Legislature's attention was called to the situation, it did not re-enact the old law, nor pass a law with retroactive effect to amend and support its former law. On the contrary the Legislature of Kentucky endeavored to find an acceptable compromise between the State's previous law, and the Act of Congress and passed a law approved March 14, 1924 (Appendix, p. 75), classifying bank shares so that the local rates were limited to 20 cents for counties, 20 cents for cities and 40 cents for schools in addition to the State rate. Certainly nothing could more clearly illustrate that the Legislature did not intend to remedy previous defects in the law or pass a law making valid retroactively any laws previously passed which were invalid under the laws of the United States.

Nevertheless the Court of Appeals of Kentucky rejected the interpretation of District Judge Elliott in Minnehaha National Bank v. Anderson, 2 Fed (2d) 897, wherein he said, in a case similar to that at bar:

> "As applied to the case at bar I think a fair interpretation of this amendment is that South Dakota's laws in regard to taxing of national bank stock is illegal and exceeded the limitation prescribed by section 5219, Rev. Stat., U. S., as it existed prior to the amendment."

Just preceding the last quotation it had been said:

> "This amendment is not retroactive. The last provision, subdivision 4, conclusively determines that it was not intended to be retroactive."

And, again:

> "Congress * * * by this amendment provided in effect, as I construe it, that the State of Dakota might pass a curative act subjecting the

> complainant to the tax of three mills, the same as other moneys named in section 5219, Rev. Stat., U. S. * * *
>
> "The State of South Dakota was thereby given the power, to confirm or ratify any tax theretofore levied upon the complainant to the extent of 3 mills, the amount that would be valid under the construction given Section 5219, as theretofore in force.
>
> "It is urged that this subdivision 4, of the amendment of 1923, to the United States statutes, amounts to a curative act of all past taxes whether legal or illegal under that section. I am of the opinion that if that had been the intention of Congress, it would have been its plain duty to say so. I cannot find by a fair interpretation of this language any such intent on the part of Congress."

The decision of the Court of Appeals in the case at bar was called to the attention of the Supreme Court of Minnesota in the case of State v. First National Bank of St. Paul, 204 N. W. 874, and that Court dismissed the argument of the Court of Appeals of Kentucky, in the following summary way, page 880:

> "Plaintiff calls our attention to McFarland v. Georgetown National Bank, 270 S. W. 995, in which the Kentucky Court construed the provision last quoted as legalizing prior taxes which would be valid under section 5219 as amended by the proviso above quoted, but were invalid under that section as it stood when the tax was levied. We are unable to concur in this construction."

Therefore, we submit that for the taxes retroactively levied on bank shares for the years 1919 to 1922, based upon assessments made as of July 1st previous to each year, the Court of Appeals was in error in deciding that the Act of March 4, 1923, had any application without legislative action, and that a sheriff of the county upon merely receiving "corrected" tax bills issued by a county clerk for previous years could determine the policy of the State without legislative action to that effect.

That the Court of Appeals of Kentucky likewise erred in assuming that the amendment of March 4, 1923, materially enlarged U. S. Rev. Stat. 5219, is indicated by this Court's opinion in First National Bank of Guthrie Center v. Anderson, County Auditor, 46 Sup. Ct. Rep. 135, 139, wherein it was said:

> "The defendants say that this reenactment was intended as a legislative interpretation of the prior restriction, and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the reenactment did no more than to put into express words that which, according to repeated decisions of this court, was implied before. * * * What bearing a different legislative interpretation might have on a tax already levied, as here, **need not be considered.**"

In view of this Court's decision in Duplex Printing Co. v. Deering, 254 U. S. 443, 474, 475, we think we are justified in quoting the language of Chairman McFadden of the House Committee in charge of this amendment, who, in explaining a proposed further amendment to U. S. Rev. Stat., Sec. 5219, explained the purpose of Congress in passing the amendment in question.

It is shown by the Congressional Record of March 23, 1926, page 5869, that the following occurred:

> "Mr. Moors of Virginia. Will the gentleman **explain** exactly what the present law is before he comes to a discussion of this amendment?
>
> "Mr. McFadden. Yes; section 5219, as enacted in 1864 and substantially continued down to 1923 provided only one method for the taxation of national banks by the States, to wit, the inclusion of the shares 'in the valuation of the personal property of the owner or holder of such shares.' But that permission to the States was upon the condition that such taxation—
>
> > " 'Shall not be a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.'
>
> "This restriction was construed in the Mercantile Bank case and in the prior decisions therein cited as only including moneyed capital in the hands of individual citizens directly or indirectly coming into competition with the business of national banks."

After quoting decisions from this Court construing the previous law, he continued:

> "Now, in 1923, because of the decision of the Supreme Court, known as the Richmond case, we, in 1923, passed an amendment, which amendment

> **codified** the above holdings in the Mercantile and Richmond cases, as to the ad valorem taxation of national bank shares, with a proviso making it plain that the restriction, **as thus construed and applied,** did not apply to intangibles generally but only to those that normally enter into the business of national banks **in the sense of those decisions**. The act of March 4, 1923, in addition extended the powers of the States by providing two other alternative methods of taxation for the benefit of those States which had adopted income taxes as follows:
>
> " '(a) In the alternative, national bank shares dividends might be included in taxable income of individuals on a parity with other taxable income, or
>
> " '(b) National banks might be taxed directly upon net income to the extent that other corporations were taxed thereon.'
>
> "In other words, States could under the act of March 4, 1923, select one of the three above methods for taxing national banks or their shareholders."

It is, therefore, submitted that:

First, the amendment was not intended to extend the previous statute as construed by this Court and the Court of Appeals of Kentucky erred in assuming that it did do so.

Secondly, assuming that the amendment did extend the power of the States to tax national bank shares, it did not do so without curative legislation.

Therefore, as the Kentucky Court of Appeals assumed these false premises for its decision, and indicated that its judgment would be otherwise but for such premises, its judgment should be reversed.

IV.

FOURTH ASSIGNMENT OF ERRORS.

The Court erred in construing U. S. Rev. Stat. 5219.

It is settled, of course, that the shares in national banks as Federal fiscal agents can only be taxed to the extent and in the manner authorized by Congress.

People v. Weaver, 100 U. S. 539.
Merchants National Bank v. City of Richmond, 256 U. S. 635.
First National Bank of Guthrie Center v. Anderson, 46 Sup. Ct. Rep. 135.

We have submitted above (pages 26-34) that the amendment of March 4, 1923, to Section 5219 did not enlarge the powers of the State and was not retroactively self-executing, and that the decision of the Court of Appeals of Kentucky in the case at bar was based upon the assumption that said amendment enlarged the powers of the States in taxing national bank shares and was retroactive without State legislation.

The original law and amendment thereto are printed in parallel columns in the appendix (page 76). It seems necessary to consider the purpose of Congress in adopting this amendment. When the original law was adopted practically all of the States were under a system of uniform ad valorem taxation. By modern development of State tax laws approximately 22 States follow the uniform ad valorem basis of taxation.*

Approximately 12 States have adopted a form of classifying property and applying uniform rates for the various classes.‡

Approximately 10 States have adopted an income taxation basis for personal property.†

In many States questions arose as to whether the shares of stock of national banks could be taxed at all where such shares were entitled to a classification rate less than that sought to be charged, or could be taxed at all in those States where no provision of the State law taxed the moneyed capital in the hands of individuals.

To meet the situation Congress deemed it appropriate to amend U. S. Rev. Stat., Section 5219, and by Clause (b) to codify the old statute as construed by this Court in permitting the ad valorem taxation of shares of national banks; by Clause (c) to provide for the taxation of the net income of national banking associations, and by Clause (d) to provide for the taxation of the dividends received by the stockholders of national bank shares.

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*Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming.

‡Arizona, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Dakota, Oklahoma, Virginia.

†Delaware, Massachusetts, Missouri, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Virginia, Wisconsin.

In each of these classes and in the proposed class under a further amendment, very definite and specific bases of comparison are described to avoid any discrimination against investors in bank shares.

Therefore, it is not to be presumed that Congress has been indefinite in providing protection for investors in bank shares where the old system of ad valorem taxation or classification is followed and the tax is levied on the shares.

Under Clause (c) it will be noted that where a State taxes the income of an association, the tax rate shall not be higher than that assessed upon other financial corporations nor higher than the rates assessed upon the net income of "mercantile, manufacturing and business corporations doing business within its limits."

Under Clause (d) it will be noted that where a State imposes an income tax upon the dividends of the shareholders of national banks, a certain basis of comparison is specified to prevent discrimination by words that such tax "shall not be at a higher rate than is assessed upon the income from other moneyed capital."

Certainly Congress did not mean to provide definite and easily applied standards of comparison to prevent discrimination against bank shares in the two new added sections (and in the proposed new section), but in the original section to make uncertain and indefinite the standard of protection to investors in bank shares where the States followed the ad valorem basis and imposed the tax on the shares of stock. Yet this is the conclusion which the Court of Appeals of Kentucky reached in holding that unless the bank could prove directly "by evidence without dispute" that moneyed capital enjoying a lesser rate came into direct competition in a substantial amount, the State law might exempt all moneyed capital from local taxation and subject only bank shares and those in domestic life insurance companies to such taxation without violating the protection intended by Congress.

This conclusion was reached in view of the amendment of Clause (b) which added to the original words

> "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

the following words:

> "coming into competition with the business of national banks; provided that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

Certainly some basis of comparison was intended for the protection of national bank shareholders in those States following the ad valorem basis of taxing shares, just as was provided a definite basis for comparison where the income of the association was made taxable or the States were permitted to tax the dividends received by the stockholders in national banks.

It is certain from this Court's repeated decisions and the express finding in Merchants National Bank v. City of Richmond, 256 U. S. 635, 639, that Congress has not made the sole standard or basis of comparison the tax which the State might be willing to levy upon its own financial institutions, but, as repeatedly shown above, there must be considered, money at interest, credits and demands against persons or corporations held by individual citizens of the State, and also the money of individual citizens invested in loans or securities for the payment of money. The words "coming into competition" as used have never been limited to mean, as was assumed in the case at bar, actual bidding on a particular security desired by the bank but moneyed capital of individual citizens used in the market in general for investment in securities similar to national bank shares and what the proceeds of such shares are invested in in the normal course of the banking business.

As shown above (p. 11, *et seq.*) where the State law exempts **all** moneyed capital, under an ad valorem system of taxation, from local taxation, and subjects only bank shares and the shares in domestic life insurance companies and corporate franchises as intangible personal property to such local taxation, there is a discrimination on the face of the law, and it is not necessary to consider the materiality of the amount exempted or to prove the exact items of such moneyed capital coming into competition with the investors in bank shares or the investment of the proceeds thereof in the usual course of banking.

The Court of Appeals of Kentucky seems to have interpreted the amended Act to mean that no investment of individual citizens of a State, in bonds, notes or other evidences of indebtedness may be considered in determining whether there is discrimination against the taxation of shareholders in national banks. Such construction of the Act of Congress renders the clause meaningless—especially in a State where **all forms** of intangible property of all citizens and firms in the State are given a preferential classification and are required to pay only from 1/7 to 1/9 of the tax rate sought to be imposed on national bank shareholders.

Certainly such a State law could not be valid in one-half of the counties of the State and invalid in the other half of such counties; or valid in one city of a county and invalid in another city of the county. To so construe the protection intended to be afforded to national banks where the States follow the ad valorem classification laws and tax shares directly, would make the clause meaningless and ineffectual, whereas, as above pointed out, Congress has adopted for comparison in the taxation of national banks definite standards in every other instance, and such must be presumed to have been the purpose of the section under consideration.

Therefore, it is submitted that when it is shown that by the State law **all** intangible personal property in the State representing five times as much as the total valuation of all bank shares, is exempt from all local taxation and only bank shares and stock in domestic life insurance companies and corporate franchises are made subject to local taxation, that hostile discrimination is established as **a matter of law**; or if this be not true, as we believe it is, that in the instant case the record establishes that **as a matter of fact** there is actual discrimination in a material amount in favor of competing capital in Scott County, Ky., and in the State of Kentucky, as we will next consider.

V.

SIXTH ASSIGNMENT OF ERRORS.

The Court flagrantly erred in its finding of facts as to competition of other moneyed capital with national bank shares.

The Court of Appeals, to sustain its conclusion, found facts which it is respectfully submitted are not supported by the record, nor, as assumed by it, based upon common knowledge. The sixth assignment of errors as to the facts is given in detail in the appendix (p. 81).

We assume that this Court, where a Federal question is involved, has full authority to reconsider the record and assumed facts. In support of this conclusion we need only cite Mr. Chief Justice Taft's opinion, and the cases therein cited, in Truax v. Corrigan, 257 U. S. 312, 324, where it is said:

> "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. Mackay v. Dillon, 4 How. 421; Dower v. Richards,

151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. Bailey v. Alabama, 219 U. S. 219, 238, 239; Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418; Mugler v. Kansas, 123 U. S. 623, 661; Corn Products Refining Co. v. Eddy, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 656, 668, 669; Southern Pacific Co. v. Schuler, 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts. Northern Pacific Co. v. North Dakota, 236 U. S. 585, 593; Jones National Bank v. Yates, 240 U. S. 541, 552, 553. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by

> demurrer, violates the Federal Constitution, this Court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute."

The Court of Appeals of Kentucky, after assuming that the amendment to Section 5219 had liberalized the State powers and was retroactive without State legislative action, and that under this Court's decisions various kinds of property might be exempted or given preferential rates without the right of complaint by national bank shareholders, then proceeded to find the facts to accord with these views, as follows (R. 112):

> "In this case it is not shown by evidence **without dispute** that the moneyed capital in the hands of individuals invested in bonds, notes and other evidences of indebtedness comes in competition with the national banks. While a number of witnesses so testify, there is testimony to the contrary and the conclusion of the witnesses testifying to the existence of competition is not borne out by the facts shown by all the testimony. It is shown by all the testimony that the banks make short time loans and that they decline to make loans on long time. It is also shown that the banks are lending to the limit and are rediscounting their paper in order to accommodate customers for a large part of the year. The moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running

> for a longer time than banks are willing to lend money for. It is not shown by anybody that any appreciable amount of money held by individuals is used in short time loans, such as the banks make, and this being true, the capital invested in land notes and the like does not come in competition with the national banks, for they do not handle this character of paper. The facts shown by the record warrant the conclusion that no material part of the capital held by the individuals is so invested as to come in competition with the national banks and on the record we so hold."

1. Sixth Assignment of Errors (a) (R. 116). The case at bar is the only case we have discovered where in weighing and considering the evidence the Court deemed it necessary that a party should establish its cause "by evidence without dispute."

The rule in Kentucky, as elsewhere, is that rights are determined by the weight of the evidence and that the Appellate Court will not reverse the finding of facts by the Chancellor (R. 31) as the court did in this case, unless he was clearly unsupported by the evidence. Emberger v. Commonwealth, 208 Ky. 782; Dotson v. Hunt, 207 Ky. 832.

2. Sixth Assignment of Errors (c) (R. 116). The Court in part based its conclusion upon the following sentences:

> "It is shown by all the testimony that the banks make short time loans and that they decline to make loans on long time. It is also shown that the banks are lending to the limit and are rediscounting their paper in order to accommodate customers for a large part of the year."

This quotation embraces a question of fact and a question of law. It cannot be true, as a matter of law, that a State law is valid or invalid according to whether the banks of the county have been able to make some or a large amount of loans in competition with individual citizens or have been unable to make any loans because of such competition. It cannot be the province of a State Court to determine in what class of authorized investments national banks shall invest, or to consider whether at some time of the year national banks are availing themselves of their charter powers to borrow money or to rediscount with the Federal Reserve Bank. A great deal of the cross-examination by the defendants was to show that at some time of the year the banks borrowed money or rediscounted with the Federal Reserve. From this it was argued that if some banks obtained a fair share, no question of competition could be material. (R. 65, 67, 70, 72, 73, 85, 86, 100, 101.) Neither the statutes nor decisions justify such limitation on the meaning of competition. Newport National Bank v. Board of Education, 114 Ky. 87, 91.

We will not burden this brief by lengthy quotations to show that the conclusion of the Court is not sustained by the evidence, but comment that the record shows that while the banks do at some period borrow, none of them have reached their limit, and it is not the province of the Court to undertake to determine in what character of investments or in how much thereof a bank shall invest. The overwhelming testimony shows that the loans and purchases by numerous individuals are made in competition with the banks, of notes and mortgages desired and invested in by the banks; that they seek them to establish relations and that they are profitable, as we will hereafter point out.

3. Sixth Assignment of Errors, sub (b), (d) and (e) (R. 116). The Court of Appeals makes these findings of facts, which may be considered together:

> "It is shown by all the testimony that the banks make short time loans and that they decline to make long time loans."
>
> "the moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running for a longer time than banks are willing to lend money for * * *."
>
> "it is not shown by anybody that any appreciable amount of money held by individuals is used in short time loans, such as the banks make, and this being true, the investment in land notes and the like does not come in competition with the national banks, for they do not handle that character of paper."

From the foregoing it is apparent that the Court in substance finds the facts as follows:

1. That banks make only short time loans.

2. That banks do not invest in purchase lien notes or mortgages.

3. That individuals loan or invest only in long time notes.

4. That, therefore, there is no competition.

As we believe all of these findings are contrary to the great preponderance of the testimony, we are compelled to quote from the testimony extensively. However, we will indicate upon the margin of the quotations that contrary to the findings under the designations for 1. and 2. "bank loans" and for 3. and 4. "competition" and similar syllabi. From this we believe it will be apparent how far the Court erred in stating the effect of "all the testimony" and as to what "is not shown by anybody."

We have shown above (pp. 12-13) from the testimony of Ben Marshall, Secretary of the Kentucky State Tax Commission, that in Scott County, Kentucky, there were loans and investments by individual citizens of Scott County reported for taxation consisting of, secured notes $1,060,726; unsecured notes $159,111; and taxable bonds $188,280; and that, in the opinion of all the witnesses, owing to the difficulty of discovering intangibles, such property reported for taxation by individuals does not represent more than 25% to 40% of that actually subject to taxation in the county. (R. 58, 77, 80, 81.)

We have shown above that the total investment in bank shares in the county was $539,466, or approximately one-third of the loans and investments taxed to individuals.

We have shown that by counties in the State of Kentucky the aggregate reported taxable intangible personal property, exclusive of bank shares, was $309,407,155; and the total valuation of all shares of banks and trust companies in Kentucky was $64,183,735; *i. e.*, approximately five times as much was taxed to individuals as the total valuation of all the shares of banks and trust companies.

Now we must consider the direct testimony.

(A) **G. T. Hambrick, Cashier** of plaintiff-in-error, testified (R. 57) that his bank had invested in real estate mortgage paper $170,142.60; in collateral paper $35,773.82; in secured paper $806,574; the latter including investments in purchase lien notes.

Bank Loans

Asked as to whether the items enumerated by the Secretary of the State Tax Commission as being held by individuals were such securities as the bank invested in, and whether there was competition for such securities, the witness testified (R. 58):

> "A. Banks make money, for its shareholders in two ways. By loans to individuals, firms and corporations, and by investing its funds in bonds and other securities. Banks loan on real estate mortgages, loans secured by collateral, and loans secured by personal securities. Banks invest in Government, Railroad, Industrial Bonds, State, County and Municipal bonds, State warrants, county warrants, and city warrants. **Now the individual takes up a large per cent of the high rate paper, thus forcing banks to keep their surplus funds on deposit with their city correspondents,** on which they receive interest at the rate of two and a half to three per cent. He forces them to employ their funds in investment of lower rate securities, such as Government bonds and Treasury certificates. Individuals loaning money operate in two or three ways against the interest of banks. Not only taking investments from the banks, but withdrawn funds on deposit, thereby lessening the earning powers of the bank.
>
> "When an individual loans his money, the borrower feels no obligation to do business with any

Bank Loans

Competition

particular bank, whereas when a bank makes a loan it forms a tie between the individual and the loaning bank, thereby increasing the bank's business. **I have known cases where individuals have made loans at a smaller rate of interest than was being charged by the banks, and borrowers would get their money from individuals and pay the bank and in many instances this very money was withdrawn from the bank whose loan was paid off.**

Competitio

"The individual lender has no operating expenses, whereas the overhead of banks amount to a very large sum. For instance in the case of the Georgetown National Bank, the expenses of this bank, irrespective of taxes, and interest paid on deposits, amounts to at least twenty per cent of the par value of the capital stock, and the taxes amount to about seven per cent of the par value of the capital stock."

On cross-examination (R. 63) he was asked:

> "Q. Have you at any time been unable to secure such of these vendor's lien paper that you wanted by reason of the individual competitor preventing you from getting it; if so designate what ones?
>
> A. I do not remember just when, but I know there have been a number of good loans which the bank would have liked to have had, which individuals had taken up."

He was cross-examined (R. 66) as to the length of time real estate paper ran before maturity, and stated it ran various lengths of time, and was pressed as to whether or not his bank desired the long term paper, and he answered (R. 66):

> "On three or five years, no, sir. **But I would like to add that the loans in the hands of individuals are not all long time loans** running from three to five years, but **a great many loans from six to twelve months are held by individuals."**

He testified (R. 69) that banks preferred purchase lien notes to straight mortgages, but were unable to secure them. He was then asked:

> "Q. You were asked as to the length of time—paper was mentioned as three to five years; I will ask you what percentage of paper is ever presented to your bank that is over three years in time of payment?
>
> A. A very, very small per cent.
>
> Q. Is it even as much as one per cent in your opinion, of the paper you handle?
>
> A. I should say not.
>
> Q. Is it not a fact that a great majority of the paper presented, I do not mean such as you actually handle, but a great majority presented to you for handling, is six, twelve, eighteen and twenty-four months?
>
> A. Yes, sir, that is about the usual length of time.
>
> Q. Is not a great majority of it six and twelve months' paper?
>
> A. Yes, sir."

The witness was cross-examined as to the unsecured notes listed in the schedule filed by Ben Marshall, Secretary of the State Tax Commission, and stated that he knew the borrowers and in many instances the lenders, but he was then asked (R. 71):

Falacious Bases of "Competition"

> "State whose names are on the paper, the terms of the paper and what interest they bear, and when the loan was made, if you know?"

After stating he could not give details, he was asked:

> "Q. Therefore, you cannot testify under oath as to the character, terms, maturity, date, or any of the features which determine the desirability of any of these notes listed in Mr. Marshall's report of the notes taxed as being in the hands of individuals.
>
> A. No, sir."

The witness had already testified he knew of the character of the notes and the lenders and the borrowers, and upon further reflection testified (R. 90):

Specific Cases of Competitiv Loans

> "Q. You have heretofore stated that there were men—individuals in the County of Scott who loaned money in the same methods practically as the bank does. I wish you would give specific examples without giving the names of persons engaged in the business of loaning money buying notes and discounting them, etc. That is in the year 1921?
>
> A. **I have before me a list of parties who loaned money the same as the banks.** I have five parties whom **I know made loans** in the year 1921, in the aggregate amount of $87,800.00.
>
> Q. Take the first one you have on the list, how much did he loan in that year?
>
> A. The first one I have **loaned money to three parties,** a total of $33,000.00.

Q. The second one?

A. **Loaned to five men** a total of $24,800.00.

Q. The third?

A. **To two men,** a total of $20,000.00, the fourth made one loan of four thousand dollars, the fifth one loan of six thousand dollars.

Q. **Were these loans that they made, the paper they handled, the same kind of paper the bank handles?**

A. **Yes, sir, the same kind of paper the bank handles.**

Q. Do you know the names of the individuals to whom they loaned the money?

A. Yes, sir.

Q. **Were they such notes as the bank would handle?**

A. **Yes, sir, every one of them.**

Q. Does this list which you have presented in any wise represent the entire amount that has been loaned that you have knowledge of in that year, or just examples?

A. **Just examples, I am sure there is a good deal more. I should say four or five times that amount was loaned.**

Q. How did this information in regard to this come to you?

A. I have seen these notes.

Q. Did it come to you in the course of your banking business?

A. Yes, sir, in the course of our banking business.

Q. Do you want to disclose their names?

A. No, sir, I could not do that."

On cross-examination the witness testified (R. 91):

Specific Cases of Competitive Loans

"Q. What is your reason for not disclosing the names of these examples that you have in mind?

A. It is confidential business.

Q. In what way is it confidential—did the bank have any part in the transaction?

A. No, sir, not at all. I take it that the bank has no right to disclose the name of parties to whom their customers loan money, or the amount they loan.

Q. **Were these men who loaned this money depositors in your bank?**

A. **Most of them.**

Q. Do you know the details with reference to the loans you refer to?

A. How do you mean?

Q. As to the matter of fact whether they were loans or some other character of indebtedness?

A. **They were direct loans to the borrowers.**

Q. How do you know that?

A. **The notes show they are, and checks were given to the borrowers in a number of cases on our bank.**

Q. Have you custody of these notes?

A. No, sir.

Q. How did you happen to see the notes?

A. I saw some of them when they were given, and a number of them are in our safety deposit boxes.

Q. Did the bank in any of these cases secure these loans for these people?

A. No, sir.

Q. Did the bank, or any official of the bank, have anything to do with arranging or bringing about these loans or any of them.

A. No, sir, not a one of them.

Q. Were you consulted with reference to the character of these loans by any of the parties who made the loans?

A. I was in two instances.

Q. You recommended the loans to your customers?

A. I think the loans were made and then the notes shown to me and my opinion was asked regarding them.

Q. Were any of these persons **to whom these loans were made customers of your bank?**

A. **Yes, sir.**

Q. Did any of them apply to your bank to make the loan?

A. No, sir.

Q. Are they just personal notes, or notes secured by mortgage or vendor's lien?

A. All personal notes except two.

Q. What kind are they?

A. They are vendor's lien, purchased from the party who sold the real estate to the maker of the note.

Q. Are you able to state whether the bank desired these loans, and would have handled them at the time they were made by these individuals?

A. **We would.**"

Bank Loans

(B) **W. A. Hinton, Cashier of the Farmers Deposit Bank of Sadieville,** who has engaged in the business in Scott County since 1901, testified (R. 75) that his bank had invested in real estate mortgages $220,020, and in securities by personal sureties and other securities $203,382.14, making his total loans and discounts $423,402.14. He then testified:

"Q. From your knowledge of bank conditions, and general money conditions in your neighborhood, do you consider that the individual investor in secured notes and unsecured notes, bonds, etc., comes into competition with your bank shares, and with the conduct of the business of your bank in that community?

A. Yes, sir.

Q. Do you consider that that competition on the part of individuals in your community is relatively large or small in amount? **Competition**

A. Large.

Q. From your knowledge of conditions there are investments of this kind made by individuals, would you say that this competition was substantially the same as if there were another bank operating in your community?

A. Yes, sir, almost the same."

(C) **W. G. Abbott, Cashier First National Bank, Georgetown,** testified (R. 77) that the total loans and discounts of his bank were $548,144.91; that this was invested in real estate mortgages to the amount of $78,691.63; in loans secured by stocks and bonds to the amount of $17,265.14; personal secured notes $446,788.14; in other bonds and securities $92,573.52; and had on deposit with corresponding banks $75,466.54. **Bank Loans**

He was then asked (R. 77) if from his knowledge of the extent to which individuals loaned money in the county, either on secured or unsecured paper, he considered these individuals came into competition with his bank shares and the conduct of his banking business, he answered, "it certainly does," and continued:

Competition

"Q. Do you consider that such competition furnished by individuals as relatively large or small in amount?

A. Large.

Q. In your banking business, have you not had experience of a depositor taking money out of your bank for the purpose of taking up desirable loans held by your bank?

A. Yes, sir, I have.

Q. State whether or not that experience is frequent or the reverse?

A. Rather frequent. I have known it to happen very often.

Q. Now in the face of competition which has been noted by one of the other bankers, I will call your attention, and ask if it has come in your experience also, that is by individual investors absorbing a large amount of the high interest local paper, and local securities, and forcing your money to be invested in lower rates of interest, or forcing it to remain on deposit at a very much lower rate of interest. Is that true, or not, in your experience?

A. It is true, has been true in our bank.

Q. Since the tax rate on securities such as I have enumerated in the hands of individuals has been lowered to a total of forty cents for all purposes, state whether or not you have noticed **an increase in individuals to engage in the business of loaning money and purchasing securities?**

A. Yes, sir, there is an increase in it.

Q. Do you consider that that increase is a direct result of the lower tax rate on securities?

A. Yes, sir."

(D) **C. B. Roberts, Cashier Citizens Bank of Stamping Ground,** Scott County, since 1900, testified (R. 79) (filed Exhibit, R. 106) that his bank had invested in real estate mortgages $102,759.86; loaned on personal security $96,246.99; loaned on stocks and bonds $850; and had due from banks $21,150 out of his total resources of $234,000.00.

Bank Loans

> "Q. From your knowledge of money conditions in your community, and of money loaned by individuals generally in your community, state whether or not individuals making loans on unsecured notes or on notes secured by mortgage, or local securities or other kinds, in your opinion come into competition with your bank shares and with the conduct of the business of your bank?
>
> A. Yes, sir, very much so.
>
> Q. In your opinion is this competition material or otherwise?
>
> A. Yes, sir, it is very material.
>
> Q. Where is your bank located?
>
> A. Stamping Ground, Scott County, Kentucky.
>
> Q. Is there any other bank in your immediate community?
>
> A. No, sir.
>
> Q. Suppose there were another bank located in your community of substantially the same size as yours, and individual competition were eliminated, do you think there would be any difference in the competition between such a bank and the individual competition as it now exists?
>
> A. I do not think there would be any.

Competition

> Q. If individual competition were eliminated in making such loans what effect do you think it would have on the earning capacity of your bank, and on the amount of dividend that you would be able to pay on your bank shares?
>
> A. Suppose we were paying a six per cent dividend, I think it would increase the dividend to at least ten per cent."

(E) **J. C. Nichols, Cashier Farmers Bank & Trust Company, Georgetown,** testified (R. 80) that the total loans and discounts of his bank were $720,708.03, divided: loans secured by mortgage on real estate $348,463.68; loans secured by collateral $89,973.43; unsecured loans, or personal surety only, $288,270.93; bonds and securities held $200,558.41, and on deposit with corresponding banks $67,751.59. He was asked to consider the tabulated schedule of the Secretary of the State Tax Commission, showing the items above mentioned, and asked whether or not in his opinion the individual investors or lenders in bonds, secured notes and unsecured notes, came into competition with his bank shares and his banking business, and he answered (R. 81):

Bank Loans

> "My opinion is that it does create competition and serious competition as evidenced by the total amount as shown by Mr. Marshall's statement which is $1,408,000.00 of bonds, and secured and unsecured notes. This amount is considerable in excess of the loans of any bank, national or state, in this county, and is also a larger amount than the investments of some two or possibly three of the smaller banks in our county. Particularly is

Competition

this true concerning mortgage paper in which our bank is a considerable purchaser, **and in many instances the lender of this money obtains the best and more marketable mortgage paper.** This money, in many instances, **has been withdrawn from deposit** in the Farmers Bank & Trust Company, and loaned to individuals, **who in turn pays off the loan to us.**"

Asked how the competition affects his bank, he continued:

Competition

"In one way it prevents us from buying many mortgage loans, and in withdrawing money of the customer from the bank, thereby in two ways reducing the earnings of the bank. Again customers do business with a bank through one or two ways, either by reason of knowing some one intimately connected with the bank, or by the existence of loans and favors granted them. Usually an individual who has obtained a loan from a bank becomes a customer of that bank, thereby becoming an asset of the bank and a real friend. Becoming a customer in many instances becomes a saver. Through taking up these choice loans by the individual the bank is hindered considerably in its influence in a neighborhood through loaning its money, making its earnings and benefiting that community. **Also by the individual absorbing these select investments, the bank is forced to invest surplus funds in investments yielding a lower rate of interest,** such investments, as United States Bonds and Treasury notes, which yield from four to four and a half per cent per annum, state, county and city warrants, and other high class bonds. This lower rate means a reduction of earnings to said bank. In some instances we have learned and seen **loans that have been made to our customers by individuals at a lower rate of interest than we charged, thereby having our loan paid off, and our earnings decreased.** * * *"

Continuing (R. 83) he said:

Competition

"Our bank makes mortgage loans in this community, the individual lender does the same. The bank loans money on collateral and the lending individual does the same. The bank loans its funds on high class, one named personal security notes, state and county warrants, the individual lender does the same. From the rapid increase of loans in the hands of the individual lenders, and **the severe competition created thereby, and the difference in tax rates,** and overhead expenses borne by the bank, **it has become a real menace to the banking interest,** and is limited only by the amount of money loaned by the individual before the bank is seriously handicapped in its line of business and influence in the community."

Being pressed to give a specific instance of persons lending on secured or unsecured paper as distinguished from mortgage bonds, he further testified (R. 93):

Specific Cases of Competitive Loans

"Q. Without giving their names will you give specific examples and the amount of the loans?

A. There were fourteen loans amounting to $24,500.00 by five individuals.

Q. Was that in the year 1921?

A. Yes, sir, 1921.

Q. Does that in any wise cover the amount of money loaned by individuals that came under your observation as banker for that year, or just examples?

A. **Just examples and some I have definite knowledge of, definite remembrance of.**

Q. **Were these loans such loans as the bank would have handled?**

A. **In nearly every instance.**

Q. **Was it desirable paper from the banker's standpoint?**

A. **It was.**

Q. Did that actually come into competition with the bank's business?

A. It did in a way for some of the loans were made to people—**customers of our bank.**

Q. Did the information in regard to these loans come to you in a confidential relation as a banker?

A. It did.

Q. You have specific names and amounts in your mind when making that statement?

A. Yes, sir.

Q. Did your bank seek to make any of these loans?

A. No, sir.

Q. Did it make any effort to get any of these loans?

A. No, sir, they did not apply to the bank for them.

Q. The bank made no effort to secure these loans made by other people which you have testified to?

A. No, sir, **but the people to whom the money was loaned were in most instances our customers, and the people making the loans were our customers."**

From this testimony it appears the national banks in Scott County, Kentucky, have invested over $800,000 in mortgages, not counting purchase lien notes carried as secured notes. That 205 individual citizens of Scott County have loaned on or invested in mortgages and purchase lien notes reported for taxation over $1,060,000, and that at least half of this amount is in the hands of money lenders.

For argument, putting aside the direct testimony as to competition, we would like to inquire of counsel for defendant-in-error upon what doctrine of chance it could be assumed that all of 205 lenders of over $1,060,000 took only long-term mortgages and the five banks took over $800,000 of only short-term mortgages. The evidence is certainly to the contrary.

As to unsecured notes or secured only by personal endorsement it is shown that the banks have invested considerably over $1,000,000, and that 63 individual citizens of Scott County have reported for taxation $159,111 (which is shown by expert opinion to represent less than one-third of the total outstanding notes), so there must be over $468,000 thereof. It is shown by Hambrick and Nichols as mere illustrations that they know ten money lenders who loaned to 26 borrowers in the county $112,300 in notes which were good bankable paper and the total of such individual loans is, in the opinion of Hambrick, at least four or five times greater than the amount shown in the illustrations.

It is to be noted that by stipulation (R. 22) the testimony was limited to the year 1922 and

> "it is hereby understood and agreed that the state of facts as shown to exist by the proof for the above mentioned year will be taken as indicative of the facts for the other years in question."

Therefore, the character of competition and the amount thereof shown for this year must be assumed to be continuous during the whole of the four years in controversy.

In addition to all of this it is shown that only three people reported taxable bonds, which is its self-corroboration of the omission of property from the tax rolls. However, these three individuals reported taxable bonds to the amount of $188,280, and certainly taxable bonds are competitive investment.

It is respectfully submitted that these proven facts show a great deal more than the facts recited by this Court in the case of Merchants National Bank v. Richmond, 256 U. S. 635, upon which it was said, at page 638:

> "**It is to be inferred that a substantial part of this aggregate** was in the hands of individual taxpayers; the precise amount does not appear."

Against this unanimous testimony the defendant introduced one witness, the County Clerk, who made out the "corrected" tax bills in litigation, viz., L. L. Calvert, 35 years old, who was formerly Deputy County Clerk, and served as Assistant Cashier of the Citizens Bank of Stamping Ground from 1914 to 1916, and for about three years was a director in the First National Bank of Georgetown. His testimony is directed chiefly to the fallacious theory that it was necessary for the plaintiff-in-error to prove actual direct competition with some specified lender of money for each particular loan.

As the Court of Appeals seems to have largely been influenced by his testimony and the argument thereon and his reason is so apparently fallacious, we quote from it without further comment.

Calvert testified (R. 96):

> "Q. From your experience as a banker in this county, and from your knowledge drawn from your official duties in the County Clerk's office, and in banking, I will ask you to state whether or not in your opinion, the loans made by individual owners in this county as disclosed by this record comes into material competition with the bank, and state your reasons for your opinion?
>
> A. No, sir—my reasons are, in the first place, that some of the loans made by individuals are loans which the bank refuses, and others are lien notes held direct by parties on land which they have sold, and for the further reason that my observation of banks in this county has been that the banks can loan practically their limit during any time or nearly so.
>
> Q. I will ask you whether or not it is true, to your knowledge, that the banks of the county are frequently seeking an opportunity to get rid of loans, paper that they hold in order to release their funds, and if they do not throughout practically every year transfer a certain amount of the paper they carry to individuals—
>
> A. Yes, sir; that is true I think, from my observations that that sometimes prevents them from having larger rediscounts."

Also (R. 98, 99):

"Q. In your opinion, do the banks themselves come in competition with each other?

A. To some extent, yes, sir.

Q. Do you consider any competition in the banking business at all?

A. I do.

Q. In what does it consist?

A. Occasionally one bank **will try to win deposits** from another bank, **which would be competitive business.**

Q. Do you not consider the business of the bank to consist of just two things—getting deposits and investing these deposits—

A. That is true.

Q. Would you not say then that any person having money to deposit and investing it in the same class of security that the banks invest in necessarily comes in competition with it?

A. Not always, in my opinion; no, sir.

Q. Again going back to the other question that certainly each individual bank comes in competition with each individual other bank?

A. To some extent they are in competition, and in some cases I have known them to assist each other.

Q. It is true that a competitor sometimes assists his competitor?

A. Yes, sir.

Q. Taking your own estimate of the amount of these mortgage notes that you say are vendor's liens, that would leave still a total of over five hundred thousand dollars invested in secured notes by individuals—comparing these with the assets of the various banks, do you not think that that sum of money invested and withdrawn from deposit, necessarily comes in competition with these banks?

A. No, sir; because I think a large portion of that is still not in competition, because I do not pretend to say that we have all of the land notes, or all of the other kind of investments. Or the good ones I know about, that is not a fair per cent.

Q. From your knowledge of the methods of giving property in for taxation, and from your knowledge of individual holders of paper, do you not think that the sum of five hundred thousand dollars as given in for taxation in 1921, unsecured notes, represent a very small portion of the unsecured notes actually held in the county by individuals?

A. No, sir; from my observation I would say it represented a large per cent.

Q. You know, of course, that the bank's form of investment of its funds is in mortgage notes, vendor's lien notes, unsecured notes and collateral notes, do you not?

A. Yes.

Q. Also a few county warrants, city warrants, and bonds, and other form of bonds?

A. Yes, sir.

Q. Taking the notes and mortgages, vendor's liens, etc., all of these, or practically all of them are local borrowers, are they not?

A. Most of them; yes, sir.

Q. Do you not personally know that it is the custom for individuals here to invest in local county warrants and city warrants?

A. I think there are; yes, sir.

Q. Suppose there is a certain commodity in which five persons are dealing, both in buying and selling, then suppose we will say that number is doubled, do you not think that **that is bound to create competition in the buying and selling of that commodity—additional competition.**

A. **It might unless the commodity itself was enlarged, which I think is true in 1921.**

Q. I am referring now, of course, in this particular instance to a commodity, that we are dealing in is notes, local bonds and some outside bonds, warrants, we have five banks dealing in buying and selling of these commodities, do you not think that the individuals who then come into the market with funds which amount to as much or more than any bank in the community, is bound to come in competition with each of these banks?

A. **Not if these banks are able to compete to the amount that their deposits will stand, I do not.**

Q. Do you not think that the fact that these individuals who are buying this same commodity and dealing in it, withdraw the money which they invest in this commodity, from the bank, this is an additional competition and an additional drag on the business of the bank?

A. I do not, from the fact that the men who would invest in that would invest in something if he did not receive that.

Q. Don't you know it to be a fact that before the tax rate was lowered to forty cents on such class of paper, it was the custom of individuals to leave very large amounts of money on deposit in the banks for a long time, and that that custom has been greatly decreased since the tax rate was lowered?

A. No, sir; from my observation of the bank in which I worked, the deposits that you refer to are now larger than they were at that time."

Also (R. 101):

"Q. I will ask you if, in your knowledge of the banks in this county, there has ever been any competition in the county with banks that caused the banks at any time to have to loan their money on local paper at any less than six per cent?

A. Not from my observation; no, sir.

Q. From your knowledge of bank conditions, I will ask your opinion in regard to this fact. It has been stated by some of the witnesses in this case that at a certain time of the year there arises in the banks surplus on account of cash coming in from the sale of tobacco, between January and April, now as a banker I will ask you to state whether or not it would be good banking or whether or not it is the policy of banks, to seek local securities or any of the character of loans that individuals invest in as shown by this record, for the purpose of investing that surplus, or is it the policy of the bank, and is it good banking for the banks to reserve that surplus in the hands of their correspondents to meet the banks' demands which always arise later in the year?

A. I think it only safe banking to reserve that from the fact that the deposits decrease later in the year to where a bank would not be safe if they loaned their full capacity at that period. These individuals' loans run for such a period as would not be safe for a bank to hold under those conditions.

Q. Then it is necessary for bankers to lay up that reserve in order to carry on their banking business throughout the remainder of the year?

A. It is."

It was apparently upon the testimony of this inexperienced witness that the Court of Appeals reached the final conclusion on the facts as follows:

> "It is not shown by anybody that any appreciable amount of money held by individuals is used in short time loans, such as the banks make, and this being true, the capital invested in land notes and the like does not come in competition with the national banks, for they do not handle this character of paper. The facts shown by the record warrant the conclusion that no material part of the capital held by the individuals is so invested as to come in competition with the national banks and on the record we so hold."

We submit that this finding and conclusion is contrary to the overwhelming weight of the evidence, and based upon a fallacious theory as to what constitutes competition within the meaning of the law.

The same Judge who wrote the above opinion in the case at bar also wrote the opinion for the same Court in Newport National Bank v. Board of Education, 114 Ky. 87, 90, wherein it upheld the right of a national bank to invest in 40-year school bonds of Newport, Kentucky, and said:

> "The powers of a national bank are derived from the Act of Congress * * *."

Page 91:

> "Every reason which sustains the power of a national bank to deal in the bonds of the United States or interest-bearing coupons of municipal bonds applies with equal force to its purchase of corporate bonds, for one is precisely an evidence of debt just as the other, and the purchase of one is no less a negotiation than the purchase of the other. The same reasons of public policy, too, apply in one case as the other. A large part of the capital of the country is invested in national banks, or controlled by them, and, if none of this capital could be applied to the purchase of municipal or corporate bonds, then the value of these securities would be greatly impaired, and much injustice will be done to the municipalities of the country."

If national banks may invest in 40-year municipal bonds, and if they could not do so, "then the value of these securities would be greatly impaired," it would seem to follow inevitably that for over 250 individual citizens to purchase over $1,000,000 of mortgages and purchase lien notes in the county, as compared with over $800,000 thereof purchased by the banks, shows competition for such investments.

Without a resumé we refer to the points and authorities (p. i) and respectfully submit that for manifest errors the judgment should be reversed.

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APPENDIX

Section 171 of Constitution of Kentucky:

> "The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.
>
> "The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation. * * *"

Section 172 of Constitution of Kentucky:

> "All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law."

Section 4019a-10 of Kentucky Statutes:

> "All property subject to taxation for state purposes as provided in section 4020, Kentucky Statutes, shall be subject also to taxation in the county, city, school or other taxing district in which same has a tax-

able situs, except the following classes of property which shall be subject to taxation for state purposes only:

"(1) Farm implements and farm machinery owned by a person actually engaged in farming and used in his farm operations.

"(2) Machinery and products in course of manufacture of persons, firms or corporations, actually engaged in manufacturing and their raw material actually on hand at their plants for the purpose of manufacture. Provided, that persons, firms or corporations actually engaged in the printing, publication and distribution of a newspaper or newspapers, or operating a job printing plant, shall be deemed to be actually engaged in manufacturing within the meaning of this Act.

"(3) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge or otherwise, or unsecured. Shares of stock not relieved from assessment under section 4088 of this act; provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks, trust companies, or combined banks and trust companies, doing business in Kentucky, or domestic life insurance companies.

"And provided, further, every state bank and trust company incorporated under the laws of this commonwealth, and every national bank doing business therein and located in any county, city, town or taxing district in this commonwealth shall make to the assessing officer of the county, city, town or taxing district a report showing the following facts, to wit: The name and postoffice address of the bank or trust company; the names of the president, cashier and board of directors thereof; the number of shares of stock, and the par and market value of each share; the amount of surplus fund and undivided profits; the amount of its deposits; the amount of cash on hand; the amount of bonds and other securities held by it; the amount loaned on mortgages and the amount of its loans and discounts; the amount of value of all real estate situated in this commonwealth, held and owned by the bank or trust company on the first day of September of each year; and such other information as may be required. The assessing officer of the county, city, town or taxing district wherein any trust company, state and national bank is situated, shall assess the shares of such trust company, state and national bank for taxation for state, county, city, town and taxing district purposes. Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares by said board the assessed value of its real estate in this state.

"It shall be the duty of the trust company and banks to list with the county assessor of each county, and with the assessing officer in each city, town and taxing district its real estate and pay taxes thereon to the sheriff and to the collecting officer of each city, town and taxing district, and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district, at the same time and manner as prescribed by law for the return of the assessment of personal property therein.

"The equalization, collection, penalties and laws relating thereto, now provided by law for other personal property in the county, city, town or taxing district, shall apply in like manner to the collection of the taxes herein provided for. Any county, city, town or taxing district, not now having the right to collect such taxes by suit is hereby authorized and empowered so to do. Nothing herein shall be construed to repeal or amend chapter thirty-three of the acts of 1904, approved March 18, 1904, entitled 'An act to amend the revenue laws of the cities of the first class so as to carry into effect the amendment of section 181 of the present constitution.' " (Section as amended March 20, 1922, c. 18, p. 67.)

Kentucky Statutes, Section 4092:

> "An annual tax, at the same rate which may be fixed by law upon other personalty for state purposes, is hereby imposed upon each one hundred dollars ($100.00) of value of the shares of state banks and trust companies, incorporated under the laws of this commonwealth, and of national banks doing business therein, and such tax shall be paid to the treasurer of the state annually by such banks and trust companies for and on behalf of the owners of such shares of stock; and in addition thereto the said banks and trust companies shall pay to the local authorities in counties, cities, towns and districts taxes at the same rate imposed upon other personalty therein."

Section 4019a-16 of the Kentucky Statutes:

> "(1) That an annual ad valorem tax of forty cents (40c) on each one hundred dollars ($100.00) of the fair cash value of all unmanufactured agricultural products subject to taxation, other than unmanufactured agricultural products actually on hand at the plants of manufacturing concerns, for the purpose of manufacture, shall be paid by the owner, person or corporation assessed, which tax shall be for state purposes only, and in lieu of all other ad valorem taxes by the state, or any county, city, town or other taxing district, on such unmanufactured agricultural products wherever grown except that cities and counties of the state may each impose an ad valorem tax of not exceeding fifteen (15c) on each one hundred dollars ($100.00) of the fair cash value of all such unmanufactured agricultural products subject to taxation within their limits. Unmanufactured agricultural products in the hands of a producer shall not be sub-

ject to this tax for the year in which same were grown.

"(2) All state taxes collected hereunder shall be paid into the state treasury to the credit of the general expenditure fund.

"(3) The assessment, the date thereof, the equalization and the collection of the tax herein imposed shall be governed by the laws applicable to other tangible personal property. * * *"

Chapter 117, Acts of 1924:

"(a) An annual tax of fifty cents (50 cents) on each one hundred dollars of their fair cash value is hereby imposed upon the shares of stock of State banks and trust companies, incorporated under the laws of this Commonwealth, and of national banks doing business therein, and such tax shall be paid to the sheriff of the county annually by such banks and trust companies for and on behalf of the owners of such shares of stock; such tax shall be for State purposes only, and in lieu of all other taxes upon said shares by the State, or any county, city, town, or other taxing district.

"(b) Except that the county in which the said bank or trust company is located may impose a tax of not exceeding twenty cents (20 cents) on the one hundred dollars of the fair cash value of such shares; and

"(c) Except that the city or town in which said bank or trust company is located may impose a tax of not exceeding twenty cents (20 cents) on the one hundred dollars of the fair cash value of such shares; and

"(d) Except that the tax of not exceeding forty cents (40 cents) on the one hundred dollars of the fair cash value of such shares may be imposed for school purposes by the regularly constituted authorities levying such tax or taxes in the district in which such bank or trust company is located; provided that when more than one levy is made for school purposes in the same year upon the same property, the said authorized levy, but not exceeding forty cents (40 cents) in the aggregate, shall be distributed between said levies for school purposes in the proportion which the rate of each bears to the aggregate of all said rates.

U. S. REVISED STATUTES.

Section 5219.	**Act of March 4, 1923.**
Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but	
the legislature of each State may determine and direct	The legislature of each State may determine and direct, subject to the provisions of this section,
the manner and place of taxing all the shares of national banking associations located within the State,	the manner and place of taxing all the shares of national banking associations located within its limits.
subject only to the two restrictions,	The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:
	1. (a) The imposition by said State of any one of the

that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State,

above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations do-

	ing business within its limits.
	(d) In case the dividends derived from the said shares are taxed, the tax shall not be a greater rate than is assessed upon the net income from other moneyed capital.
and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere.	2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such non-resident shareholders.
Nothing herein shall be construed to exempt the real property of associations from either State, County, or municipal taxes, to the same extent, according to its value, as other real property is taxed.	3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.
	4. The provisions of Section 5219 of the Revised Statutes of the United States as heretofore in

force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.

THE ASSIGNMENTS OF ERROR (R. 115).

"Now comes The Georgetown National Bank, plaintiff-in-error, and respectfully submits that in the record, proceedings, decisions, and final judgment of the Court of Appeals of the State of Kentucky, in the above matter, there is manifest—in this towit:

"First. The court erred in holding that the provisions of Chapter 108 of the Kentucky Statutes, and especially Section 4019a-10 thereof, of the laws of the State of Kentucky, are not in conflict with and in violation of the provisions of and repugnant to United States Revised Statutes, Section 5219, for that the State of Kentucky, by and through the provisions of said chapter and said section, assumes and seeks, through the defendant-in-error, as Sheriff of Scott County, Kentucky, and the Collector of Revenue, for the purposes of said county: (a) To deprive the plaintiff-in-error, as a national banking association, of the immunities and protection provided by said Act of Congross, Revised Statutes, Section 5219, in that all taxable intangible personal property, including all moneyed capital in the hands of the individual citizens of such State excepting only the shares of stock in national banks, State banks and trust companies, in the State of Kentucky and in Scott

County, Kentucky, is made taxable at the rate of 40c per one hundred dollars of valuation and taxable 'for State purposes only,' whereas shares of stock of plaintiff-in-error and all other national banking associations, State banks and trust companies doing business in the State of Kentucky, are 'in addition thereto' made liable to county, city and school taxing rates levied in the several jursidictions and in Scott County, Kentucky, aggregating a total of $2.70 per one hundred dollars of valuation.

"(b) To deprive and to deny to the plaintiff-in-eror, and all other national banking associations, State banks and trust companies doing business within the jurisdiction of the Commonwealth of Kentucky, the equal protection of the law and especially of the Fourteenth Amendment to the Constitution of the United States.

"Second. The court erred in holding that by the provisions of Section 4019a-10 of the laws of Kentucky, the plaintiff-in-error is not deprived of its rights, privileges and immunities secured to it and other national banking associations organized under the Act of Congress, and especially of Revised Statutes, Section 5219 thereof.

"Third. The court erred in holding that the Act of Congress approved March 4, 1923, as an amendment and re-enactment of Revised Statutes, Section 5219, was retroactive, and that said amendment 'was intended to give the power to collect taxes levied under the old Act if such levy was valid under the amendment'; and 'under that Act' (the amendment of March 4, 1923) 'the Kentucky Statutes is valid,' and the taxes levied for said county purposes for each of the years 1919, 1920, 1921 and 1922, are collectible.

"Fourth. The Court erred in its interpretation and construction of Revised Statutes, Section 5219, to the prejudice and damage and injury of plaintiff-in-error.

"Fifth. The court erred in its interpretation and construction of the Act of Congress of March 4, 1923, amending and re-enacting Revised Statutes, Section 5219, to the prejudice and damage and injury of plaintiff-in-error.

"Sixth. The court erred in holding:

"(a) That it was necessary for the plaintiff-in-error to establish its case by conclusive and undisputed evidence and in holding against the plaintiff's contention, because 'in this case it is not shown by evidence without dispute that the moneyed capital in the hands of individuals invested in bonds, notes or other evidences of indebtedness comes into competition with the national banks.'

"(b) That 'it is shown by all the testimony that the banks make short-time loans and that they decline to make long-time loans.'

"(c) That because banks generally, and plaintiff-in-error, avail themselves of their national charter powers to borrow money or rediscount notes, competition of individual citizens in like securities is immaterial, upon the assumption that it is not a function of banks in making money to avail themselves of their right to borrow money or rediscount during part of the year for the purpose of making short-time loans.

"(d) That because 'the moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running for a longer time than banks are willing to lend money for,' there is no competition with banks, notwithstanding the evidence established that banks did and do so invest in large amounts and are in direct competition with individual lenders to secure such loans and that national banks are expressly authorized to so invest by an Act of Congress known as Federal Reserve Act, Section 24.

"(e) That 'it is not shown by anybody that any appreciable amount of money held by individuals is used in short-time loans, such as the banks make, and this being true the investment in land, notes and the like does not come in competition with the national banks, for they do not handle that character of paper'; whereas the fact is that such competition, in a material amount, was established by the evidence, and that all intangible personal property in Kentucky owned by individuals throughout the State is given the preferential and discriminatory 40c rate, and bank shares alone are subjected to higher rates aggregating $2.70 per hundred dollars of valuation, or higher.

"(f) That 'the facts shown by the record warrant the conclusion that no material part of the capital held by individuals is so invested as to come in competition with national banks, and on the record we so hold'; whereas the evidence established exactly the contrary and established that throughout the State of Kentucky, individual investors in all taxable intangible personal property have invested over $309,000,000, while the total investment in all the capital stock in all the banks in Kentucky is approximately $64,000,000; that the individual citizens of Scott County, Kentucky, had made investments in competition with the banks of Scott County to an amount of approximately $1,000,000, while the investments in the capital stock of all the banks of Scott County amount to only $480,000, and the investments in the capital stock of the national banks of that county amounted to only $220,000.00, and the Circuit Court through the Chancellor so held."

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 377

GEORGETOWN NATIONAL BANK, Plaintiff-in-Error.

vs.

OLLIE M. McFARLAND, Sheriff of Scott
County, Kentucky;
THE FISCAL COURT OF SCOTT COUNTY, KENTUCKY, ETC., ET AL, Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR

Statement

LAWS OF KENTUCKY RELATIVE TO TAXATION OF BANK SHARES AND OTHER PERSONAL PROPERTY.

In 1915 Section 171 of the Constitution of Kentucky was amended by adding the following provision:

> "The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation."

In 1917 the Legislature of Kentucky made a general revision of the tax laws of the state.

So much of the 1917 Acts as are material to the consideration of this case are as follows:

General State Tax Ky. Stat. Sec. No. 4019.

> "An annual tax of forty (40) cents upon each one hundred dollars ($100) of value of all property directed to be assessed for taxation, as herein provided, shall be paid by the owner, person or corporation assessed."

Bank Deposits exempted from local tax and subjected to only nominal state tax Ky. Stat. Sec. No. 4019a-1:

> "Every person, firm or croporation of this State having, on the first day of September, a deposit in any bank, trust company or combined bank and trust company, organized under the laws of this State, or in any national bank in this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one 1 per cent, annually, upon the amount of such deposit so held by such bank on the first day of September, and no deduction therefrom shall be made on account of any indebtedness."

Ky. Stat. Sec. No. 4019a-2:

> "No other tax shall be assessed on such deposits in bank or against the depositor of said deposits by the State or any county, city, town or other district."

Property subject to local taxation. Ky. Stat. Sec. 4019a-10:

> "All property subject to taxation for State purposes as provided in Section 4020, Kentucky Statutes, shall be subject also to taxation in the county,

city, school or other taxing district in which same has taxable situs, except the following classes of property which shall be subject to taxation for State purposes only:

(1) Farm implements and farm machinery owned by a person actually engaged in farming and used in his farm operations.

(2) Machinery and products in course of manufacture of persons, firms or corporations actually engaged in manufacturing and their raw material actually on hand at their plants for the purpose of manufacture.

(3) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge or otherwise, or unsecured. Shares of stock not relieved from assessment under Section 4088 of this act; provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks, trust companies or combined banks and trust companies doing business in Kentucky, or domestic life insurance companies. And provided, further, every State bank and trust company incorporated under the laws of this Commonwealth and every national bank doing business therein and located in any county, city, town or taxing district in this Commonwealth shall make to the assessing officer of the county, city, town or taxing district a report showing the following facts, to-wit: The name and postoffice address of the bank or trust company; the names of the president, cashier and

board of directors thereof ;the number of shares of stock and the par and market value of each share; the amount of surplus fund and undivided profits; the amount of its deposits; the amount of cash on hand; the amount of bonds and other securities held by it; the amount loaned on mortgages and the amount of its loans and discounts; the amount of value of all real estate situated in this Commonwealth, held and owned by the bank or trust company on the first day of September of each year, and such other information as may be required. The assessing officer of the county, city, town or taxing district wherein any trust company, State and National bank is situated shall assess the shares of such trust company, State and National bank for taxation for State, county, city, town and taxing district purposes. Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares by said board the assessed value of its real estate in this State. It shall be the duty of the trust company and banks to list with the county assessor of each county and with the assessing officer in each city, town and taxing district its real estate and pay the taxes thereon to the sheriff and to the collecting officer of each city, town and taxing district, and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district at the same time and manner as prescribed by law for the return of the assessment of personal property therein."

Local tax rate. The rates of taxation assessed for local purposes by the County of Scott for the years in controversy are as follows:

1919—70c per $100.00 of assessed valuation.
1920—70c per $100.00 of assessed valuation.
1921—65c per $100.00 of assessed valuation.
1922—65c per $100.00 of assessed valuation.

The shares of the plaintiff were also subject to taxation in the city of Georgetown for local purposes at the same rate assessed upon other city property.

PARTIES TO THIS CASE AND ISSUES INVOLVED.

The Plaintiff-in-Error, a National Bank, located in the city of Georgetown, Scott County, Kentucky, instituted this action on behalf of its share-holders seeking an injunction against the Defendants-in-Error, the officers of Scott County charged with the duty of assessing and collecting local taxes, to restrain them from collecting the taxes assessed upon its bank shares for county purposes for the years, 1919, 1920, 1921 and 1922, on the ground that the laws of Kentucky subjecting bank shares to local taxation are, in their application to National bank shares, illegal and void by reason of the limitation placed upon the authority of the state to tax the shares of stock of National banks by the provision of Section No. 5219 U. S. Revised Statutes, which is as follows:

> "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority

> of the State within which the association is located, but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere.
>
> "Nothing herein shall be construed to exempt the real property of associations from either State, County or Municipal taxes, to the same extent, according to its value, as other real property is taxed."

The substance of the allegations made in the Plaintiff's petition are, that in each of the years 1919, 1920, 1921 and 1922 there was in the hands of individual citizens, residing in Scott County and in the State of Kentucky, a large amount of moneyed capital consisting of money in hand, notes, bonds, accounts and other credits, all of which was exempted, by the state law, from local taxation and that said property in the hands of individual citizens was of such a character and was so employed that it was in actual and direct competition with the business of the said National Bank and by reason thereof its exemption from local taxation constitutes a hostile and unlawful discrimination against National bank shares, contrary to the provisions of the Federal Statute, above referred to.

By their answer to the petition, the Defendants denied each of the allegations of the petition with reference to said property.

Proof was taken upon the issues of fact made by the pleadings.

In accordance with the law of Kentucky in Equity Cases, the Kentucky Court of Appeals considered the evidence introduced by the parties and adjudged that the plaintiff failed to show the existence of any material amount of moneyed capital in the hands of individual citizens of the State which is so employed that it is in competition with the business of National banks and therefore denied the injunction sought by the plaintiff. (Record, 109 to 114.) Officcially reported. O. McFarland, Sheriff vs. Georgetown National Bank,, 208 Ky. 7.)

By a Writ of error to the Kentucky Court of Appeals, the plaintiff now seeks a review and reversal of the judgment of the State Court.

NO PRIVATE BANKING IN KENTUCKY.

Before entering upon the discussion of the questions involved in this case, it is necessary to have in mind the fact that in Kentucky all banking business, properly so called, is in the hands of National banks and State Incorporated banks, private banking in the State being prohibited by a law enacted in 1906, which is as follows:

> "Be it enacted by the General Assembly of the Commonwealth of Kentucky:
>
> 1. That it shall be unlawful for any person or per-

sons, either as individuals or co-partners, to engage in or conduct the business of private banking in this Commonwealth.

2. Any person or persons who shall engage in such business after this law shall become effective shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty nor more than fifty dollars for each day he or she shall be engaged in said business; after April 15, 1906, to be recovered under indictment in the circuit court of the county where the offense shall be committed.

3. Sections five hundred and ninety-nine, six hundred, six hundred and one and six hundred and two, Kentucky Statutes, relating to private banking are hereby repealed, and persons hereafter conducting or engaging in the banking business in this Commonwealth are required to become incorporated as now provided by law.

4. Under the opinion the court of appeals it being necessary that all banking business shall be conducted by incorporated banks, in order to render taxation of banks equal in this Commonwealth, an emergency is declared to exist, and this law shall be in force from its approval by the Governor."

(Acts of General Assembly of Ky. 1906, Chapter 44, Page 278)

Argument

(1.) "OTHER MONEYED CAPITAL" WITHIN THE MEANING OF THE CONGRESSIONAL RESTRICTION UPON THE AUTHORITY OF THE STATES TO TAX THE SHARES OF NATIONAL BANKS PROVIDED BY SECTION 5219, U. S. REVISED STATUTES.

It is clear that National banks are agencies of the United States and their shares cannot be taxed by the States, except by the consent of Congress, and then only in conformity with the restrictions and limitations attached to that consent.

By Section 5219 U. S. Revised Statutes, Congress assented to the taxation of the shares of National banks by the States, subject to the restriction that: "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

That which is deemed "other moneyed capital" within the meaning and purpose of this restriction has so often been stated by this Court that it seems it should be no longer open to controversy.

In the case of Mercantile Bank vs. New York, 121 U. S. 151, after carefully reviewing the earlier decisions upon the subject and pointing out the policy and purpose of the restriction as the key to its proper interpretation, the Court said:

> "But 'moneyed capital' does not mean all capital the value of which is measured in terms of

money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation; but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling 'moneyed capital', and its business may not consist in any kind of dealing in money, or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interest in railroads, in manufacturing enterprises, in mining investments and others of that description are taxed or exempted from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that congress intended, in respect to these matters, to interfere with the power and policy of the states. The business of banking as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'Moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of congress.

"That the words of the law must be so limited appears from another consideration. They do not embrace any moneyed capital, in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belnging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that descrtpiion, may have a large part of its capital in securities payable in

> money, and so may be the owners of moneyed capital; but, as we have seen, the shares of stock in such companies held by individuals are not moneyed capital.
>
> "The terms of the act of congress, therefore, include shares of stock of other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

It was contended for a time that the later case of Merchants National bank vs. Richmond, 256 U. S. 635 gave a wider meaning to the term "moneyed capital" than was attached to it in the earlier cases but in the recent case of: First National Bank of Guthrie vs. Anderson County Auditor, et al, decided by this Court on January 4, 1926, 46 S. Ct. Rep. 135 (not yet officially reported), in referring to the Richmond case, the Court said:

> "But nothing was said in the opinion indicating that an enlargement was intended. On the contrary it distinctly accepted the meaning adopted in prior decisions."

and the Court further said:

> "In Mercantile National Bank vs. New York, supra, where the terms and purpose of the restriction were much considered, it was distinctly held that the words 'other moneyed capital' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. **It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks."**

In the same case, this Court very carefully summarized the holdings of all previous cases relative to the purpose and meaning of the Federal restriction, as follows:

> "1. The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of bank-

ing. Mercantile National Bank vs. New York, 121 U. S. 138, 155, 7 S. Ct. 826, 30 L. Ed. 895; Des Moines National Bank vs. Fairweather, supra, 116.

"2. The term 'other moneyed capital', in the restriction, is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. Mercantile National Bank vs. New York, supra, 157; Aberdeen Bank vs. Chehalis County, 166 U. S. 440, 461, 17 S. Ct. 629, 41 L. Ed. 1069.

"3. Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. Mercantile National Bank vs. New York, supra, 155, 157; Palmer vs. McMahon, 133 U. S. 660, 667, 668, 10 S. Ct. 324, 33 L. Ed. 772; Talbot vs. Silver Bow County, 139 U. S. 438, 447, 11 S. Ct. 594, 35 L. Ed. 210.

"4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction. People vs. Weaver, 100 U. S. 539, 25 L Ed. 705; Boyer vs. Boyer, 113 U. S. 689, 701, 5 S. Ct. 706, 28 L. Ed. 1089; National Bank of Wellington vs. Chapman, 173 U. S. 205, 216, 19 S. Ct. 407, 43 L. Ed. 669."

The Court thus points out two specific kinds of moneyed capital which clearly fall within the meaning of the Statute, namely, investments in shares of state banks and investments employed in private banking. Since private banking is prohibited by the law of Kentucky, heretofore set out, and shares in state banks are subjected to the same tax as those of national banks, no discrimination against national bank shares in favor of either of these classes of moneyed capital is claimed to exist under the tax laws of Kentucky. Therefore, in the consideration of this case, we are confined to the third and only other class of moneyed capital which the Court includes within the meaning of that term as used in the Statute, namely, that very limited class of moneyed capital which is not actually employed in either state banking or private banking, but which, nevertheless, by reason of the manner of its employment, is brought into substantial competition with the business of national banks. The Court clearly distinguishes this class of investments from those which are known as "personal investments" consisting of bonds, notes, or other evidences of indebtedness which are held merely as personal investments by individual citizens not engaged in the banking or investment business and expressly excludes such personal investments from the meaning of the term "moneyed capital" as used in the Statute.

Isolated transactions by individual citizens by way of loans or investments in notes, stocks, or bonds, may in some remote degree be regarded as in competition with banking, but the Court has made it plain that such competition as may arise from the use of private capital in this manner does not constitute that "substantial competition" with the business of banking necessary to bring it within the meaning and purpose of the statutory restriction.

The Federal Government is not concerned as to how the State may choose to tax such property of its individual citizens or whether it should be taxed at all.

We are therefore forced to the conclusion that outside of money employed in State and private banking the only property included within the meaning of the term, other moneyed capital, as used in the Statute, is that money or property which, in the hands of individuals, is devoted, with such reasonable continuity and regularity, to a branch of business similar in character to that carried on by national banks, as to bring about, by reason of its primary and characteristic purpose, an actual business rivalry amounting to a hostile and unfriendly competition with the business of such banks. Only when so employed do the Courts regard the employment as "substantial competition."

There can be no uncertainty as to the business of national banks which may become the subject of such competition. The branches of business in which national banks may engage are comparatively limited and are clearly defined by Congress.

By Section 5136 U. S. Revised Statute, as amended in 1912, national banks are authorized as follows:

> "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title".

By Section 24 of the Federal Reserve Act as amended by the Act of September 7, 1916, C. 461, U. S. Comp. St. No. 9763, the following power is granted to national banks:

> "any national banking association not situated in a central reserve city may make loans secured by improved and unincumbered farm land situated within its Federal Reserve District or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unincumbered real estate located within one hundred miles of the place in which such bank is located,

> irrespective of district lines, subject to certain restrictions upon the amount and time of such loan."

Bearing in mind the comparatively limited scope of the business of national banks and the very narrow and restricted meaning attached to the term "other moneyed capital" as used in the Statute, there should be no difficulty in determining whether the facts of a particular case disclose the existence of substantial competition and clear discrimination against national banks in violation of the letter or spirit of the Federal Act.

(2.) THE NECESSITY OF PROOF SHOWING THE EXISTENCE OF A RELATIVELY MATERIAL AMOUNT OF "OTHER MONEYED CAPITAL" EMPLOYED IN SUBSTANTIAL COMPETITION WITH NATIONAL BANKS.

Since there are so many classes of moneyed capital, generally speaking, which do not in any way come into substantial competition with national banks and consequently are not included within the technical meaning of the term as used in the Statute, this Court, in numerous cases, has announced the rule that in the absence of facts showing clearly a discrimination by reason of the existence of a relatively material amount of "moneyed capital" within the meaning of the term, as used, and favored by a lower tax rate, the Court may well assume that all moneyed capital so favored belongs to a class of investments which does not compete with the business of national banks. It necessarily follows that the burden of proving these essential facts rests upon the party seeking to take advantage of the Federal restriction.

The burden thus cast upon the party assailing the state tax law is not met by merely showing the existence within the state of undescribed and unidentified intangible personal property in the hands of individuals bearing a lower tax rate than national banks, howsoever vast the extent of it may be. It is clear that the Government is not concerned with the tax rate imposed by the States upon intangible property in general or whether it levies any tax at all thereon so long as it does not appear that a relatively material part of the favored property comes in substantial competition with the business of national banks.

We have been unable to find any case where the Court assumed a state of facts showing discrimination against national banks in the absence of either proof or admission upon the record disclosing actual conditions.

Where, upon the record, there has been a failure to support the facts of clear discrimination by pleading and proof, the Court has denied the claims of the national banks of the character made in this action, on the ground of such failure.

In the case of First National Bank of Garnett vs. Ayers, Sheriff, 160 U. S. 640, the Court said:

> "The plaintiff in error claimed that an illegal discrimination was made against the holders of national bank stock, because the statute of the state of Kansas permits certain kinds of debts owing in good faith by any person, company, or corporation to be deducted from the gross amount of credits belonging to such person, company, or corporation, in listing

their property for taxation, while owners of shares of stock in national banks are not allowed to deduct their indebtedness from the value of their shares of stock, and for that reason the plaintiff says that the Kansas statute is in conflict with the above cited section (5219) of the statutes of the United States."

* * *

"In Mercantile Bank vs. City of New York, 121 U. S. 138, 7 Sup. Ct. 826, it was held that the main purpose of congress in fixing limits to taxation on investments in shares of national banks was to render it impossible for a state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring state institutions or individuals carrying on a similar business and operations and investments of a like character. Mr. Justice Matthews, in delivering the opinion of the court in the above cited case, gave an exhaustive review of the cases which had been decided in this court up to that time, under this section of the United States statute, and it is evident from the opinion and decision of the court in that case that the intent of the United States statute was to prevent an unjust discrimination against the moneyed capital invested in shares of national banks, by rendering it "impossible for the state, in levying a tax on such shares, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character." * * *

"From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff calls "judicial notice" of what is claimed to be a fact, viz. that the amount of moneyed capital in the state of Kansas from which debts may be deducted as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. This we cannot do. There is no proof whatever upon the subject." * * *

"As the record appears, there is no fact of which the court can take judicial notice. The relative proportion in which the moneyed capital of the state of Kansas is invested in the various kinds of securities to be therein found, this court cannot judicially know. **When proof shall be made regarding that matter, it may then be determined intelligently whether, within the Case of Mercantile Bank, supra, there has been a real discrimination against the holders of national bank shares, and hence a violation of the above-cited act of congress."**

In the case of the First National Bank vs. County of Chehalis, 166 U. S. 440, the facts were admitted by demurrer to the bill. The Court sets out in the opinion the substance of the allegations contained in the bill, as follows:

> "The substance of those allegations is: First, that there was taxable moneyed capital in Chehalis county which escaped taxation, amounting to $237,400; second, that there was also unassessed moneyed capital in other portions of the state exceeding $14,000,000; third, that the moneyed capital invested in the banks, national and state, was $11,000,000; fourth, that there was invested in the stocks and bonds of insurance, wharf and gas companies and other moneyed institutions, moneyed capital amounting to at least $26,000,000.00."

In pointing out the insufficiency of the facts alleged to indicate discrimination against the business of national banks, the Court said:

> "As to the sum of $237,400, alleged to be invested by individual citizens of Chehalis county in loans and securities to them payable and owing by other citizens of that county, we are not informed by the bill of the nature of such loans and securities, and, as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks. The same is true of the sum of $14,000,000 alleged to be invested in loans and securities by citizens of the state of Washington, and to them payable and owing by other citizens of said state. It is, indeed, alleged in the bill that these investments were 'taxable capital", but that is an averment in the nature of a legal conclusion. If those loans and securities had been identified in the bill, or their character de-

> scribed, the court might have reached a different conclusion as to their taxable character."

In attempting to avoid the application of the conclusions of this Court in the above cases to this case, the plaintiff-in-error in its brief contends that it is only where the state law favors "some forms of property" that the Court will demand proof as to the amount and nature of competition. A sufficient answer to this argument is to call attention to the case of: National Bank of Commerce vs. The City of Seattle, 166 U. S. 463, in which the Court said that the additional allegations that the favored moneyed capital referred to was all the moneyed capital in the hands of individuals outside of that invested in incorporated banks did not call for a different conclusion than the one reached in the Chehalis case. The Court said:

> "The bills of complaint in these cases are substantially of the same legal import, as far as any federal question is concerned with that considered in the case of First National Bank of Aberdeen vs. County of Chehalis, 17 Sup. Ct. 629, in which the opinion of this court has just been delivered. The only difference that we notice is that, in connection with the allegation that there existed large amounts of taxable moneyed capital owned by resident citizens and invested in interest-bearing loans and securities, there is made the additional allegation that all of said other moneyed capital referred to was all of the moneyed capital in the city owned by resident individual citizens, and invested in interest-bearing

loans, discounts, and securities, except that invested in incorporated banks located in the city.

> "It is not perceived that this additional allegation calls for any different conclusion than the one reached in the previous case. We are still uninformed whether the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks. The averment that the moneyed capital exempted was 'taxable' does not enable us to say that it therefore consisted of investments within the meaning of the term 'moneyed capital' as used in the act of congress."

In the case of the First National Bank of Wellington vs. Chapman, 173 U. S. 205, as a result of the failure of proof of facts showing what proportion of property alleged to be favored by the state law constitutes moneyed capital within the meaning of the Federal Act, the Court said:

> "As a result, we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court."

In view of the laws of Kentucky protecting national banks as well as state banks from competition by private banking and in view of the effort of the State in the revision of its tax laws to advance the interests of its banks by reducing taxation of bank deposits to only a nominal rate (1-10 of 1 per cent) and in view of the fact that state banks are in all respects placed upon an equal footing with national banks, it would hardly be contended by the most critical observer that the enactment of the Kentucky tax laws was prompted by any hostile or unfriendly attitude toward national banks. On the other hand, when considered as a whole, the laws of Kentucky bear on their face ample evidence that they have been enacted with a specific view to promoting and fostering the prosperity of banking business within the State, with reference to both national and state banking institutions. The tax legislation favoring bank deposits can be interpreted in no other way.

In contending that the Kentucky law is invalid on its face, without proof of any discrimination in fact, the plaintiff-in-error would have the Court assume as a matter of law the following conditions to exist:

(a.) That there exists in Kentucky in the hands of individual citizens who are not engaged in banking or investment business, moneyed capital employed by them with such continuity and regularity in investments which are not properly termed "personal investments" but in the employment of which the primary and characteristic purpose is the operation of a regular continuous business enterprise substantially the same as the loan and investment features of banking.

(b.) That the amount of such moneyed capital so characteristically employed is relatively material.

Such facts this Court has expressly declined to assume in the cases above referred to and the plaintiff has not pointed to any case in which the Court made such broad assumptions purely as a matter of law.

The opinion of this Court in the case of Merchants National Bank vs. City of Richmond, 256 U. S. 635, shows that the law of Virginia, then under consideration by this Court, did not merely favor "some" intangible property but upon its face levied lower tax rate than upon bank shares on "intangible personal property in general, including, bonds, notes, and other evidences of indebtedness". With this law before it, the Court said:

> "Thus in Bank of Commerce vs. Seattle, 166 U. S. 463, 464, 17 Sup. Ct. 996, 41 L, Ed. 1079, the precise ground of decision was the want of a showing that the moneyed capital left unassessed was, as to any material proportion thereof, moneyed capital coming into competition with that of national banks. To the same effect First National Bank of Wellington vs. Chapman, 173 U. S. 205, 219, 19 Sup. Ct. 407, 43 L. Ed. 669. In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of plaintiff in error was assessed, as construed and applied, exceeded the limitation prescribed by

section 5219, Rev. Stat., and hence that the tax is invalid."

If, without proof of the fact of substantial competition, the Court were at liberty to declare the Virginia Statute invalid on its face by reason of the sole fact that the law on its face favored "all" stocks, bonds and other intangible property in the hands of individual citizens, the Court certainly would have based its opinion upon the face of the law rather than upon the facts of competition established in the record The fact that the Court points out the difference between the showing of facts in the Virginia Case and the facts shown in the cases of Bank of Commerce vs. Seattle, and the First National Bank of Wellington vs. Chapman, as the sole basis for holding the Virginia law invalid, warrants the conclusion that but for such clear showing of facts upon the record the Court would have followed the rule laid down in the prior cases referred to and would have refused to declare the Virginia law invalid for want of proof of facts showing discrimination.

A still more recent illustration of the rule that the Court will require a showing of clear discrimination, as a matter of fact, before declaring a state law invalid, is found in the latest case upon the subject, First National Bank vs. Anderson, supra, decided January 4, 1926. In that case, the Court had under consideration a Statute of the State of Iowa under which the tax rate, for all purposes, upon bank shares was 143.5 mills on the dollar while the rate imposed upon "notes, mortgages, and other evidences of debt and investments of individuals in securities" was only 5 mills on the dollar.

The case was disposed of on a demurrer to the petition which set out the law of the State and contained broad allegations of fact showing actual discrimination. By the demurrer, of course, the defendant in error admitted the facts alleged but insisted that the facts disclosed by the petition were not sufficient to show discrimination.

The Iowa Statute is equally as broad on its face as the Kentucky law in its application of a lower rate of taxation to all intangible property in the hands of individuals other than bank shares and if the contention made by the plaintiff-in-error in this case, that a state law may be declared void on its face as a matter of law without proof of actual facts of discrimination, be correct, it would have been entirely unnecessary for the Court to have expended any time or effort in construing the allegations of fact contained in the petition in this Iowa Case. The lack of facts shown by the petition would have been wholly immaterial in the face of the law set out. Notwithstanding the admitted provisions of the state law, this Court found it necessary to carefully analyze the various allegations of fact with reference to the showing of actual discrimination against national banks. The opinion of the Court with reference to the sufficiency of the petition challenged by the demurrer is not based upon the face of the law set out but entirely based upon the sufficiency of the facts alleged. The Court said:

"With this understanding of the congressional restriction, we come to consider whether the allegations of fact in the petition, admitted by the demurrer, show that the tax on the bank's shares, which the state court regards as authorized by the state law, was imposed contrary to that restriction. The allegations before quoted are all that are material. They declare at the outset and again later on that the shares were subjected to a greater rate of taxation than was imposed on other moneyed capital in the hands of individuals used and utilized in competition with the bank. This declaration is so connected with the intervening allegations that it both colors and explains them. Some of these are directly to the effect that the tax on the shares was computed at the rate of 143.5 mills on the dollar while that on notes, mortgages, and other evidences of indebtedness, 'such as normally enter into the business of banking' and representing moneyed capital of individual citizens 'engaged in competition' with the bank, was computed at 5 mills on the dollar. Then follows an allegation that the amount of notes, mortgages, and other evidences of indebtedness, representing moneyed capital of individual citizens of the county and taxed at 5 mills on the dollar, was approximately $5,000,000, while the total bank stock, state and national in the county was not more than $316,852.

"The defendants point out that the allegation last mentioned does not in itself say that the $5,000,-

> 000 of other moneyed capital, or any substantial portion of it, was employed in competition with the bank, and from this they argue that the petition falls short of showing a discrimination in favor of a relatively substantial amount of moneyed capital so employed. But that allegation is so related to the others that, to be rightly understood, it must be read with them. We think such a reading shows that it is intended to refer to the notes, mortgages, and other evidences of indebtedness which the others describe as representing moneyed capital of individual citizens engaged in competition with the bank, and that it means that this competing capital, on which the 5-mills tax was imposed, approximately $5,000,000, while the bank stock, which was subjected to the tax of 143.5 mills, did not exceed $316,852. Thus understood, the allegation is in accord with the theory of which the others obviously proceed, and serves with them, to show a serious discrimination against the bank's shares and in favor of a relatively substantial amount of competing moneyed capital."

From the foregoing, it must be apparent that but for a sufficient showing of fact, the Court would not have declared the Iowa Statute invalid. We may now apply the same rule to this case and investigate the facts disclosed by this record.

(3.) THE PROOF IN THIS CASE DOES NOT SHOW THE EXISTENCE OF ANY "MONEYED CAPITAL" IN THE HANDS OF INDIVIDUAL CITIZENS IN KENTUCKY WHICH IS EMPLOYED IN SUBSTANTIAL COMPETITION WITH THE BUSINESS OF NATIONAL BANKS WITHIN THE MEANING OF SECTION 5219, U. S. REVISED STATUTES.

The contention of the plaintiff-in-error that the general rule, under which the findings of fact by the State Court are conclusive, is not applicable to this case, makes it necessary that we consider the facts disclosed by this record upon which the judgment of the Kentucky Court of Appeals was based. The plaintiff-in-error appears to construe the decision of the Kentucky Court to require that discrimination be shown "by evidence without dispute." An examination of the opinion (R. 109-115) shows that no such holding can be attributed to the Kentucky Court. In referring to the fact that in this case discrimination "is not shown by evidence without dispute" (R. 112) the Court merely distinguishes this case from the case of Merchants National Bank vs. City of Richmond, to which reference had been previously made in the opinion and in which the record showed that evidence of discrimination was shown without dispute.

The findings of fact made by the Kentucky Court are based upon a careful consideration of the evidence in the case, as a result of which the Court said: (R. 112-113)

> "The facts shown by the record warrant the conclusion that no material part of the capital held by

> individuals is so invested as to come in competition with national banks and on the record we so hold."

The proof contained in the record of this case consists of the testimony of Ben Marshall, Secretary of the State Tax Commission, L. L. Calvert, Clerk of Scott County Court, and the Cashiers of two national banks and three state banks located in Scott County. That portion of the testimony of each of these witnesses relating to the existence of moneyed capital in the hands of individuals may be summarized as follows:

Ben Marshall (R. 39 to 56)

Mr. Marshall, the Secretary of the State Tax Commission, files copies of the various assessment records showing the intangble personal property assessed to individuals in Scott County. His evidence does not pretend to describe or indicate the nature of the various classes of intangible personal property shown by the assessment records nor does his testimony in any way attempt to disclose the manner in which the individual owners employ their moneyed capital.

G. T. Hambrick (R. 56 to 75)

Mr. Hambrick, the Cashier of the plaintiff-in-error, labors under the impression that all individuals who loan money come into competition with banks. His idea of the meaning of competition is shown by the following extract from his testimony:

> "Individuals loaning money operate in two or three ways against the interest of banks. Not only taking investments from the banks, but withdraw funds on deposit, thereby lessening the earning

> power of the bank. When an individual loans his money, the borrower feels no obligation to do business with any particular bank, whereas when a bank makes a loan it forms a tie between the individual and the loaning bank, thereby increasing the bank's business. I have known cases where individuals have made loans at a smaller rate of interest than was being charged by the banks, and borrowers would get their money from individuals and pay the bank and in many instances this very money was withdrawn from the bank whose loan was paid off."

The testimony of Mr. Hambrick, upon which the plaintiff relies and emphasizes in its Brief by setting out in black type, is as follows:

> "Now the individual takes up a large per cent of the high rate paper, thus forcing banks to keep their surplus funds on deposit with their city correspondent." * * * "But I would like to add that the loans in the hands of individuals are not all long time loans running from three to five years, but a great many loans from six to twelve months are held by individuals." * * * "I have before me a list of parties who loaned money the same as the banks. I have five parties whom I know made loans in the year 1921, in the aggregate amount of $87,000.00." * * * "The first one I have loaned money to three parties, a total of $33,000.00." * * *
>
> Q. "The second one?"
>
> A. "Loaned to five men a total of $24,800.00."

Q. "The third?"

A. "To two men, a total of $20,000.00, the fourth made one loan of four thousand dollars, the fifth one loan of six thousand dollars."

Q. "Were these loans that they made, paper they handled, the same kind of paper the bank handles?"

A. "Yes sir, the same kind of paper the bank handles?"

Q. "Were they such notes as the bank handles?"

A. "Yes sir, every one of them."

Q. "Does this list which you have presented in any wise represent the entire amount that has been loaned that you have knowledge of in that year or just examples?"

A. "Just examples, I am sure there is a good deal more. I should say four or five times that amount was loaned."

Q. "Were these men who loaned this money depositors in your bank?"

A. "Most of them."

Q. "As to the matter of fact whether they were loans or some other character of indebtedness?"

A. "They were loans, direct loans to the borrowers."

Q. "How do you know that?"

A. "The notes show they are, and checks were given to the borrowers in a number of cases on our bank."

W. G. Abbett (R. 76 to 78)

Mr. Abbett is the Cashier of the First National Bank of Georgetown. His answer to the following question gives the substance of all his testimony:

> Q. "From your knowledge of the extent to which individuals loan money in this county, either on secured or unsecured paper, and your knowledge of the extent to which they buy local securities, such as local street, municipal, county bonds, and other bonds, do (fol. 144) you consider that the individual investor in these forms of security comes into competition with your bank shares, and with the conduct of your banking business?
>
> A. "It certainly does." * * *

W. A. Hinton (R. 75)

The testimony of Mr. Hinton, who is the Cashier of one of the state banks in the County, is very brief and the substance of it is contained in the following question and answer:

> Q. "From your knowledge of bank conditions, and general money conditions in your neighborhood, do you consider that the individual investor in secured notes and unsecured notes, bonds, etc., comes into competition with your bank shares, and with the conduct of the business of your bank in the community?"
>
> "A. Yes sir."

C. B. Roberts (R. 79)

Mr. Roberts, after stating his position as Cashier of the Citizens Bank of Stamping Ground, offers the following testimony:

> "Q. From your knowledge of money conditions in your community, and of money loaned by individuals generally in your community, state whether or not individuals making loans on unsecured notes or on notes secured by mortgage, or local securities or other kinds, in your opinion come into competition with your bank shares, and with the conduct of the business of your bank?"
>
> A. "Yes sir, very much so."

J. C. Nichols (R. 80 to 90)

Mr. Nichols is the Cashier of the Farmers Bank & Trust Company, a state bank, located in the County. After giving his idea of the nature of competition existing between individuals who make personal loans and banks, he gives five specific examples of loans made by customers of his bank to other customers of his bank aggregating $24,500.00.

L. L. Calvert (R. 94 to 103)

Mr. Calvert, the County Clerk of the County, was called as a witness by the plaintiff. It appears from his testimony that he was formerly a bank official in the County and at the time of giving his testimony he was a director of the First National Bank of Georgetown. On Cross-Examination, he gave the following testimony:

> Q. "From your experience as a banker in this county, and from your knowledge drawn from your official duties in the County Clerk's Office, and in banking, I will ask you to state whether or not in

your opinion, the loans made by individual owners in this county as disclosed by this record comes into material competition with the bank, and state your reasons for your opinion?"

A. "No, sir—my reasons are in the first place that some of the loans made by individuals are loans which the bank refuses, and others are lien notes held direct by parties on land which they have sold, and for the further reason that my observation of banks in this county has been that the banks can loan practically their limit during any time or nearly so."

Q. "I will ask you whether or not it is true to your knowledge that the banks of the county are frequently seeking an opportunity to get rid of loans, paper that they hold in order to release their funds, and if they do not thruout practically every year transfer a certain amount of the paper they carry to individuals?"

A. "Yes sir, that is true I think, from my observations that that sometimes prevents them from having larger re-discounts."

Q. "I will ask you if it is not true to your knowledge that the banks in this county have been willing in some cases to go to the extent of taking a second mortgage for a part of a loan where they could get Federal Land Bank or other landing concerns to take a first mortgage off their hands for a part of the land?"

A. "Quite a number of them are recorded in my office."

Each of the Bank Cashiers are very liberal in expressing their opinions with reference to competition with their banks, brought about by individuals loaning money in the County, but the conclusions expressed by these witnesses, with reference to competition, when considered in the light of their testimony as to their understanding of the term "competition" clearly shows that the competition to which they have reference is only that which is brought about by all individuals, who, in making a loan take their deposits out of the bank and buy securities which the bank might have been willing to to purchase. That such "personal investments" do not come into substantial competition with national banks appears to be beyond dispute.

None of the witnesses in this case pretend to show that any individuals mentioned or within their knowledge are engaged in the investment business as a regular enterprise or that there is any continuity or regularity whatever maintained by any of the individuals mentioned in carrying on the business of making loans. Of course, when an individual makes a loan purely as a personal loan he makes the loan "in the same way as banks" as some of the witnesses say, but it does not follow from this that he is engaged in the investment business such as is carried on regularly and continuously by banks.

A most liberal view of the testimony in this case results in showing nothing more than that there exists in Kentucky numerous instances of personal loans made by individuals not engaged in banking or investment business. These individuals are customers of the banks and, in many cases referred to, loans were made thru the banks and under the advice of bank officials. The evidence shows that the banks make a regular practice of turning over their loans to their customers who have money on deposit. The showing of a continuity or regularity of employment of moneyed capital in a particular way, by any single individual or group of individuals, is not even attempted, much less the existence of an established enterprise creating business rivalry amounting to "substantial competition" with national banks within the technical meaning of the term. With these meager facts before it, how could the Kentucky Court reach any other conclusion than that the plaintiff failed to prove its case? To hold otherwise would have made it necessary for the Court to assume many material facts in regard to which the record is utterly silent. The only presumption warranted by the failure of proof, as above indicated, is that all intangible property, in the hands of individual citizens other than bank shares, is of that class of moneyed capital which does not come in substantial competition with national banks. Were the facts otherwise the plaintiff would have certainly disclosed them by the proof.

The facts in this case are no stronger than the facts admitted upon the record in the cases of First National Bank vs. Ayers; First National Bank vs. County of Chehalis; National Bank of Commerce vs. Seattle, and First National Bank of Wellington vs. Chapman, above referred to, and the ruling of the Kentucky Court necessarily and rightfully followed the ruling of this Court in those cases.

Although in its Brief, the plaintiff-in-error has quoted at length from the testimony contained in this record, no effort is made to point out even a single example of an investment by an individual or a group of individuals other than such as represent merely personal investments not employed or engaged in the banking or investment business or any similar employment and such investments have never been deemed moneyed capital within the meaning of the Statute.

By the act of March 4, 1923, Congress amended Section 5219 of the U. S. Revised Statutes so that the restriction, heretofore quoted, now reads as follows:

> "In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks; Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

At the same time Congress added the following provision to the Statute:

> "The provisions of Section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks,

or the collecting thereof, to the extent that such tax would be valid under said section."

In commenting upon the Act as thus amended, the Kentucky Court of Appeals, assuming that by the amendment Congress intended to give the States power to collect taxes which would not have been valid under the old Act, said:

> "The provision plainly refers to taxes which would be valid under the Act but might not be valid under the original Act. The states needed no authority to collect taxes properly levied under the old Act. The section was intended to give the power to collect taxes levied under the old Act, if such levy was valid under the Amended Act. This is conclusively shown by the words 'legalizing, ratifying or confirming,' for there was no need to legalize, ratify or confirm previous levies if they were valid under the old statute. The State of Kentucky has ratified and confirmed the taxes heretofore levied and assessed by collecting them. This as we know from the current history of the state has been done for the years in question. Its proceeding by the sheriff to collect the taxes in question was an act ratifying and confirming the taxes theretofore levied and assessed and by the express words of the amendment, Section 5219, 'shall not prevent the collecting thereof to the extent that such tax would be valid under said section.' We, therefore, conclude that the state statute is valid and that the state has authority to collect the taxes under it."

The plaintiff-in-error assigns this ruling of the Kentucky Court as one of the grounds upon which it bases its claim for a reversal of this case, insisting that the Court erred in holding that the amendment of 1923 is applicable to this case without legislative action of the State.

It is plain that the only effect of this holding of the Kentucky Court is to make the rule for identifying "moneyed property" as laid down in the 1923 amendment, applicable to this case, notwithstanding the fact that this case arose several years before the passage of the amendment.

It is equally plain that, if the law as it existed, by implication, in the previous years involved in this case, was the same as expressed in the 1923 amendment, the ruling of the Kentucky Court is in no degree prejudicial to the plaintiff-in-error but properly applies the same rule to this case as would be applied to a case arising subsequent to the 1923 amendment. In referring to the law as it existed prior to the 1923 amendment, in the recent case of First National Bank vs. Anderson, supra, this Court says:

> "The re-enactment did no more than to put into express words that which, according to repeated decisions of this court, was implied before." * * * "Thus in legal contemplation and practical effect the restriction was the same before the re-enactment as after. What bearing a different legislative interpretation might have on a tax already levied, as here, need not be considered."

The law being the same before the amendment as after it, the Kentucky Court clearly made no mistake in applying the following rule expressed in the amendment to this case, to wit:

> "that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section."

Under the decisions of the Court, above set out, we respectfully insist that the proof in this record is wholly insufficient to show any violation of the letter or spirit of Section 5219 U. S. Revised Statutes, either as it existed in the years 1919 to 1922 or as it now exists since the 1923 Amendment.

(4.) THE KENTUCKY COURT OF APPEALS WAS AUTHORIZED TO WEIGH THE EVIDENCE AND DETERMINE THE ISSUES OF FACT, AND THE FINDINGS OF FACT BY THE STATE COURT ARE CONCLUSIVE.

Under the laws of Kentucky, the Court of Appeals is the final Judge of facts in an equity case. While the findings of fact by the Chancellor in the lower court are given consideration, nevertheless the Court of Appeals will weigh and judge the sufficiency of the evidence for itself.

In the case of Taber vs. McGregor, 192 Ky. 600, the rule prevailing in Kentucky is stated, as follows:

> "It is a well-recognized rule that in an action in equity the chancellor's judgment is entitled to some weight, but the Court of Appeals will weigh and judge of the sufficiency of the evidence for itself, and where it is found to preponderate for one side or the other in such a way as to convince it that the chancellor erred, his judgment will be reversed. James vs. Golden, 172 Ky. 499, 189, S. W. 446; Farmer vs. Cornett, 174 Ky. 560, 192 S. W. 628; Farmer vs. Hampton, 154 Ky. 83, 156 S. W. 1041."

In the case of Elkhorn By-product Coal Co. vs. Tynes, 188 Ky., 269, the Court said:

> "His finding of fact is entitled to great consideration by this court, but it is not conclusive, and will not be so regarded, unless sustained by the weight of the evidence."

In the case of Roberts vs. Aker & Vogt, 203, Ky. 468, the Court said:

> "The appeal presents no question of law; it raises simply an issue of fact. In cases of this character, while this court will give some weight to the finding of the chancellor, nevertheless it will give judgment according to the truth of the matter as it appears from the record."

It thus appears that the Kentucky Court was acting within its well established authority in considering the evidence and determining the question of fact involved in this case.

This brings us to the consideration of the question whether the findings of fact made by the Kentucky Court are conclusive upon this Court, in the consideration of the questions arising upon this writ of error.

In the case of Dower vs. Richards, 151 U. S. 658, the Court reviewed many cases on the subject and stated the general rule, as follows:

> "The principal ground on which the plaintiffs in error seek to reverse the judgment of the supreme court of California is that its decision, in matter of fact, was erroneous, and contrary to the weight of the evidence in the case; but to review the decision of the state court upon the question of fact is not within the jurisdiction of this court."

In the same case the Court quoted from an earlier case the words of Chief Justice Waite, saying:

> "There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." (23 Lawy. Ed. U. S. Rep. 510, 511)

It will likewise be noted in this case that the Kentucky Court of Appeals did not deny the validity of the restriction set out in Section 5219 U. S. Revised Statutes but merely held that the facts necessary to bring this case within its operation are not shown to exist.

In the case of Egan vs. Hart, 165 U. S. 188, the Court dealing with the same question said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the supreme court of the state of Louisiana. On error however, to a state court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. Dower vs. Richards, 151 U. S. 658, 14 Sup. Ct. 452; Bartlett vs. Lockwood, 160 U. S. 386, 16 Sup. Ct. 334; Stanley vs. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754. True it is that in Dower vs. Richards the court (referring to the dictum in Republican River Bridge Co. vs. Kansas Pac. Ry., 92 U. S. 315, 317) treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings."

The case of Merchants Mutual Automobile Liability Insurance Co. vs. Smart, 267 U. S. 126, was brought to this Court under the claim that a law of the State of New York was in conflict with the bankruptcy laws of the United States.

One of the objections offered to the judgment of the state court was that the state court erred in holding the evidence to be sufficient to show that the insured was insolvent. With reference to this question of fact, Mr. Chief Justice Taft said:

> "A third objection is made that there was not sufficient evidence that the insured was insolvent. This was a question of fact under the proceedings which were instituted by execution and what followed. The state courts have found it to exist and it is not for us to question their findings."

The case of Traux vs. Corrigan 257 U. S. 312, which is relied upon by the plaintiff as authority to the contrary does not appear to us to depart from the general rule so clearly established by the above cases. The gist of that opinion seems to be that where "facts alleged are admitted by demurrer this Court is at full liberty to consider them in determining their legal effect as a deprivation of plaintiffs legal rights under a Federal law." It is apparent that the determination of the effect of admitted facts under a Federal law is entirely a different proposition from the determination of the question of the existence of the facts themselves where they are not admitted.

However, another line of cases from this Court has clearly established an exception to the general rule, above stated. It is, that this Court will review the findings of the State Court as to the facts, when the conclusions of law and findings of fact are so intermingled as to make it necessary in order to pass upon the question, to analyze the facts.

That this case does not come within the exception, above stated, but is subject to the general rule, is clearly shown by the decision of this Court in a case involving the same questions of law and issues of fact as are involved here. The case referred to is that of Jenkins vs. Neff, 186 U. S. 230, in which a New York Statute was attacked as being in violation of Section 5219 U. S. Revised Statutes. It was claimed that under the state law, state trust companies bearing a lower rate of taxation than national banks were, in fact, engaged in a business in substantial competition with national banks and therefore the favors granted them under the state law amounted to illegal discrimination. The State Court of New York, after considering the facts, held that the trust companies of the state were not engaged in such employment of their capital as to come in substantial competition with national banks. The case was brought to this Court upon a writ of error to the State Court and in the opinion affirming the judgment of the Supreme Court of the State of New York, this Court said:

> "although there is in the record quite an amount of testimony as to the assets and business of trust companies in Brooklyn, yet the case was determined by the supreme and appellate courts of New York upon findings of fact,—which findings do not sustain the contention of plaintiffs in error in this respect,—and it is well settled that the findings of fact in the state courts are on a writ of error conclusive with us. Hedrick vs. Atchison, T. & S. F. F. Co. 167 U. S. 673, 677, 42 L. Ed. 320, 321, 17 Sup. Ct. Rep. 922, and cases cited therein; E. Bement & Sons vs. National Harrow Co. 184 U. S.—, ante, 747, 22 Sup.

Ct. Rep. 747. In other words, we apply the law to the facts settled in state courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

The questions of law and issues of fact are no more intermingled in this case than they were in the cases of Jenkins vs. Neff, supra, and we can see no reason for not applying the same rule in this case.

Couclusion

The foregoing authorities lead to the following conclusions:

The restriction upon the authority of the states in the taxation of national banks contained in the Federal Statutes, referred to, was designed solely as a protection to national banks from actual discrimination in favor of that particular class of moneyed capital which comes in substantial competition with them.

Such actual discrimination, against which the national banks are thus afforded protection, cannot exist where the particular class of moneyed capital, referred to, does not exist. Therefore, the primary and essential inquiry is whether the particular class of moneyed capital, referred to, exists and this is purely and simply a question of fact.

Since moneyed capital, generally speaking, is not included within the term as used in the Statute, it is clear that the mere showing of the existence of a large amount of undefined and unidentified moneyed capital in the hands of individual citizens, bearing a lower tax rate, is not sufficient to show discrimination in violation of the Statute. Moneyed capital of the particular class which comes in competition with national banks, within the meaning of the Statute, can only be identified by the purpose and nature of its employment by the individual citizen. In the absence of facts showing that the purpose and nature of its employment brings it within the particular class, referred to, there is no showing of discrimination and therefore no ground exists for invoking the protection afforded by the Federal Statute.

To permit national banks, under the cover of the Federal Statute, to escape taxation, where there is no showing of actual discrimination against them, would, in many cases, as in this case, lead to a condition of discrimination under the tax laws of the State in favor of national banks and against other banking interests, which, in its effect, would be equally as unfair and unjust as the conditions which the law was designed to prevent.

The cases above referred to show that the Courts have prevented the possibility of just such conditions as might thus arise by consistently refusing to interfere with the operation of state tax laws upon the complaint of national banks unless it be clearly shown that in the application of the laws discrimination against national banks, within the meaning of the Federal Act, in fact, exists.

Whether, in the consideration of this case, the finding of fact made by the Kentucky Court of Appeals be accepted as conclusive, as we insist it should be under the well established rule, or whether this Honorable Court examines the evidence in the record and judges the facts for itself, we think the same conclusion must be reached, namely, that the plaintiff-in-error has failed to show the existence in Kentucky of a relatively material amount of "moneyed capital" employed in substantial competition with national banks and therefore it's complaint of discrimination, within the meaning of the Federal Statute, is not supported by the record.

For the reasons stated, we respectfully ask that the judgment of the Kentucky Court of Appeals, in so far as it refuses to grant the injunction sought by the plaintiff-in-error, be affirmed.

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